TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 660

ELBERT B. LINDSEY AND E. R. LINDSEY,
PETITIONERS,

vs.

STATE OF WASHINGTON

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PETITION FOR CERTIORARI FILED JANUARY 16, 1937.

CERTIORARI GRANTED APRIL 5, 1937.

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[fol. a] [Caption omitted.]

[fol. 1]

IN SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

No. 11046. (R. C. S. 2601-2)

STATE OF WASHINGTON, Plaintiff,

vs.

ELBERT B. LINDSEY and E. R. LINDSEY, Defendants

SECOND SUBSTITUTE INFORMATION—Filed September 4, 1935

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendants Elbert B. Lindsey and E. R. Lindsey, with the crime of Grand Larceny, committed as follows:

That the said defendants, Elbert B. Lindsey and E. R. Lindsey, in the County of Spokane, State of Washington, on or about the 15th day of April, 1935, then and there being, did then and there wilfully, unlawfully, feloniously and fraudulently, by color and aid of a check in words and figures as follows, to-wit:

"Spokane, Wash. Apl 15 1935. No. 2.

Spokane and Eastern Trust Company

Pay to the order of Elbert B. Lindsey, $40.00.
Forty 00 - - - - - - - Dollars. E. R. Lindsey."

and endorsed on the back thereof: "Elbert B. Lindsey, 1104 1-2 W. 2nd Ave., Co. Service National Guard."

obtain from Peter M. Jacoy Forty Dollars ($40.00) in money and currency of the United States of America, of the value of forty dollars, and the property of the said Peter M. Jacoy, with intent to deprive and defraud the said Peter M. Jacoy, the owner thereof, the said defendants then and there knowing that the maker and drawer of said check was not authorized or entitled to make or draw the same.

Ralph E. Foley, Prosecuting Attorney in and for Spokane County, Washington, by C. C. Quackenbush, Deputy.

State of Washington,
County of Spokane, ss:

C. C. Quackenbush, being first duly sworn on oath deposes and says; That the above and foregoing information is true, as he verily believes.

C. C. Quackenbush.

Subscribed and sworn to before me this 3d day of September, 1935. Nels Paulsen, Deputy County Clerk.

[File endorsement omitted.]

[fol. 2] [File endorsements omitted]

In Superior Court of Spokane County

No. 11046

[Title omitted]

Statement of Facts on Appeal to Supreme Court of Washington—Filed December 30, 1935; Filed in Spokane Court January 2, 1936

Honorable Chas. H. Leavy, Judge. (Trial record)
E. R. Lindsey, 1104 1-2 W. 2nd Avenue, Spokane, Wash., for appellants.
Ralph E. Foley, Esq., Pros. Atty. and C. C. Quackenbush, Esq., Deputy Attorneys for respondent.

Appeal from Spokane County, Wash.

Copy received Dec. 17, 1935, Prosecuting Attorney, Spokane County, Wash.

[fol. 3] In Superior Court of Spokane County
[Title omitted]

Notice of Statement of Facts

To the State of Washington and to Ralph E. Foley, Esq., Prosecuting Attorney for Spokane County, Washington:

You, and each of you will please take notice that the above named defendants, appellants, herewith serve upon

you a copy of their proposed Statement of Facts, to be used on appeal to the Supreme Court of the State of Washington, of the proceedings occurring at the trial of said cause, had before Hon. Chas. H. Leavy, Judge, and a jury, and that the original copy is being filed with the Clerk of the Superior Court for Spokane County, Washington, and that defendants, appellants, will, at the expiration of ten days from the date of service hereof, to-wit: on December 27, 1935, apply to the said Judge in his court room at Spokane, Washington to have the same settled and certified.

Done at Spokane, Washington, December 16, 1935.

E. R. Lindsey, For Defendants.

Received copy and service admitted this 16th day of December, 1925. ——, Prosecuting Attorney for Spokane County, Wash.

[fol. 4] In Superior Court of Spokane County

[Title omitted]

Statement of Facts

Be it Remembered, That heretofore and to-wit, on the 12th day of September, A. D., 1935, the above entitled cause came on for trial on the pleadings heretofore filed herein, before Honorable Chas. H. Leavy, Judge of the Superior Court for Spokane County, Washington, presiding, and a jury which was duly and regularly empaneled; the defendant Elbert B. Lindsey being present in person and by his counsel W. C. Donovan, Esq., and the defendant E. R. Lindsey being present and represented by his counsel Ralph E. Carlson, Esq., and the defendant E. R. Lindsey announced himself ready for trial, and the defendant Elbert B. Lindsey objecting to proceeding with the trial by reason of the fact that he was unable to employ counsel and that counsel had just, at that time, been appointed for him, and that he had no time to consult with counsel, or prepare his case, which objection was overruled and exception taken by said defendant, and the State of Washington being represented by C. C. Quackenbush, Esq., Deputy Prosecuting Attorney, and the court having ordered that the trial proceed, the following testimony was introduced, and proceedings had, to-wit:

A jury was empaneled and the prosecutor made an opening statement.

[fol. 5] PETER M. JACOY, a witness for the prosecution was sworn, and testified:

Direct examination.

By C. C. Quackenbush:

Mr. Carlson: At this time the defendant E. R. Lindsey objects to the introduction of any testimony on the ground that the information does not state a cause of action as to him.

The Court: Objection overruled. Exception noted.

A. My name is Peter M. Jacoy; my place of business is 402 Sprague Avenue, a cigar and confectionery store; I have lived in Spokane 30 odd years. I know the defendants Elbert B. Lindsey and E. R. Lindsey.

Q. Calling your attention to the date of April 15th, did you see either of the defendants?

A. Well, I don't know exactly whether it was on that particular 15th day. It must have been between the 15th or 16th of April but I would not say which one of those dates, I saw that gentleman over there (indicating Elbert B. Lindsey,) at 402 Sprague Avenue at my place of business.

Q. I hand you State's exhibit No. 1 for identification; State what that is?

A. It is a Forty Dollar check drawn on the Spokane and Eastern Trust Company.

Q. What was done in regard to State's exhibit No. 1, for identification on April 15th or the 16th?

A. Well, he came in and wanted the clerk to cash the check but the clerk turned this over to me, and I had a talk with Mr. Lindsey and asked him about the check and he told me that I could call Dr. Countryman over the phone; that he was sent over there by Dr. Countryman and the check was all right, but I didn't call Dr. Countryman, as I had seen him in there previously and knew him by sight, and [fol. 6] so I went ahead and cashed the check.

Q. And you accepted this instrument?

A. Yes.

Q. Then what did you do with this instrument?

A. I took the check and sent it to the bank, and a few days afterwards the check came back to us.

Q. Then who did you deliver the check to?

A. If I am not mistaken we delivered it to the insurance Co. the National Surety Co.

Q. Do you know the name of the representative of that Co.?

A. Yes, Mr. Pilkey.

Q. And what did Elbert Lindsey say to you with regard to the check; was there any conversation in regard to the check?

A. Well, it was made out and he signed on the back, he endorsed it before I gave him the money.

Q. Was there anything said about there not being and funds in the bank?

A. No.

Cross-examination.

By Mr. Donovan:

Q. This was on Saturday night?

A. It was in the afternoon but I don't recall the exact date.

Q. Would you say it was not on Saturday?

A. It was between the 15th and 16th.

Q. How do you fix the time of day?

A. It was between the 15th and 16th. It is there plain on the back of the check.

Q. The question is, from your own knowledge, can you tell when the check was presented to you?

[fol. 7] A. Yes.

Q. On this particular check can you say it was not presented to you on Saturday?

A. I would not say because I didn't look at the calendar.

Q. Would you say it was not on the 13th or 14th?

A. No.

Q. You don't know whether it was the 15th or 16th?

A. It was between the 15th and 16th. There is the stamp.

Q. But there is no date when the stamp was put on; is there any statement in your handwriting or any memorandum you made when the check came to you?

A. On the deposit slip, yes; the slip is dated and when the check comes back from the bank we refer back to this slip, and you can tell the date when the check went through the bank.

Q. Suppose the check came in on Saturday; if the check came in on Saturday you wouldn't make a deposit until the following Monday, isn't that correct?

A. Yes.

Q. Then your deposit slip would show the deposit on Monday?

A. Yes, it would show on Monday.

Q. So that so far as you know now you have no recollection, you don't know the date when this check was presented to you to be cashed?

A. We would know on the date but not the day of the month.

Q. What date was it cashed by you?

A. 15th or 16th of April.

Q. Could it have been presented to you at your place of business on Saturday the 13th?

A. No.

[fol. 8] Q. No, because the stamp on the back of the check will tell you what date it was presented.

Q. That shows when it went through the bank clearing house?

A. Yes.

Q. But that is not what I am getting at; do you know from your own knowledge or any record you have the date of the day when this check was handed to you and cashed by you except from the stamp on the back?

A. I could not say the day of the week but I could tell the day of the month.

Q. You said it was the 15th or 16th?

A. Yes.

Q. But that is all the reason there is, the stamp on the back from the bank?

A. No, not exactly. When the check came back we referred back to this record and that will show it was cashed on that date.

Q. Did you look up on your record to see when the check was cashed?

A. That could show the day of the month the check was presented.

Q. You say you haven't looked at your record since you were subpoened as a witness?

A. I didn't think it was necessary.

Mr. Quackenbush:

Q. You are positive it was either the 15th or 16th and not the 13th or 14th?

A. Absolutely.

By Mr. Donovan:

Q. Pardon me, there is one more question I want to ask Mr. Jacoy; the amount of this check was repaid to you was it not?

Mr. Quackenbush: I object as immaterial.
The Court: Objection sustained.
Exception.

[fol. 9] Mr. L. W. Pelkey, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is L. W. Pelkey; I live in Spokane; am the representative of the fraudulent bond department of the National Surety Corporation. Mr. Jacoy called me over to the store one morning and gave me this check, State's exhibit No. 1 for identification. I went to the police station to investigate the check and saw Mr. Aikman down there and gave the check to him.

Witness excused.

A. E. Aikman, a witness for the state was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is A. E. Aikman, I live in Spokane and am a police officer of the Spokane Police department, have been for 23 years. I first saw state's exhibit No. 1 for identification when Mr. Pelkey handed it to me on the 18th of April.

Witness excused.

M. S. Dugger, a witness called for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is M. S. Dugger and I live in Spokane and am a police officer and was such on April 15th of this year. I

have seen State's exhibit No. 1 for identification before. I put that pencil writing on the back myself, M. S. Dugger.

Witness excused.

CAPT. JAS. MCCARRY, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is James McCarry and I am a captain in the detective department of the Spokane police force, have been in the dept. about 25 years, and in this office 6 years. [fol. 10] I was in the same position on April 15, 1935. I have seen State's exhibit No. 1 for identification before in my office in the detective department on April 18, 1935. I put those two lines on the back, also my initials. Those would indicate the check was handed to me on that date and I put those on for identification.

Witness excused.

Mr. Quackenbush: At this time I offer State's exhibit No. 1 for identification in evidence.

Mr. Donovan: No objection.

The Court: It may be admitted.

(State's exhibit No. 1 admitted in evidence and marked.)

IGNATIUS MORRISON, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is Ignatius Morrison; I live at West 124 Nora; I know E. R. Lindsey and Elbert B. Lindsey.

Q. Calling your attention to the date of April 15, 1935, did you see them on that occasion?

A. I did.

Q. Will you state where you saw them?

Mr. Donovan: I object as incompetent, irrelevant and immaterial and having no bearing on the issues in this case.

The Court: Objection overruled.

Exception.

A. I saw the younger Mr. Lindsey in Hart & Dillatush's drugstore; the older Mr. Lindsey was at the corner of Stevens and Riverside about a half a block north from the drugstore.

Q. Did you have some conversation with the defendant Elbert B. Lindsey in Hart & Dillatush's drugstore?

A. I did.

Q. Will you state to the jury what it was?

Mr. Donovan: I object as incompetent, irrelevant and immaterial and not tending to prove any issue in this case, [fol. 11] and made out of the presence of the other defendant, E. R. Lindsey.

The Court: Objection overruled.

Exception.

A. When I entered Hart & Dillatush's drugstore I saw the younger Mr. Lindsey in there. I have known him for some time and we exchanged greetings, and he told me he was attempting to cash a check and was having a very difficult time. It was a $40 check I believe. I know he handed the check to the clerk and told him to call up Dr. Countryman who would vouch for the check, and the clerk went to the back of the store and in the meantime a party in there said that they did not have that much money, and the younger Mr. Lindsey asked where he could get the check cashed and I said Peter Jacoy's is a good place to cash checks and the younger Mr. Lindsey and I left the store and walked north on to Riverside Avenue.

Q. What took place then?

Mr. Donovan: I object to anything further as incompetent, irrelevant and immaterial, and move to strike all the testimony of this witness as being incompetent, irrelevant and immaterial and made out of the presence of the other defendant.

The Court: Objection overruled; motion denied.

Exception.

He asked me where I thought he could get it cashed and I told him I believed he could get it cashed at Peter Jacoy's, and so I went down the street to the corner and I turned West, and the younger Mr. Lindsey turned East, and just then the elder Mr. Lindsey was standing in the arch of Emery's clothing store and he came out from there and

whistled to the younger Mr. Lindsey who was crossing the street; he then turned and saw his father, and then walked across the street and then went east towards Washington street, and then I don't know what direction he went from there.

[fol. 12] It was on Monday the 15th of April, 1935.

Cross-examination.

By Mr. Donovan:

A. I fix the date because a day or two later I noticed in the paper where they had been arrested and I recollected back, it was two or three days prior to that I saw the younger Mr. Lindsey, I saw the check but not enough to see what the amount was.

Q. How long have you known Mr. Lindsey, Sr.?

A. I have known him to see him for some time. I don't know him personally. I have seen him up in the law library.

On April 15th I believe I was in the distributing business with my father.

Witness excused.

A. E. Aikman, a witness for the state, recalled.

Direct examination.

By Mr. Quackenbush:

A. I am the same A. E. Aikman who testified before. On the 18th day of April, 1935 I was present in Captain McCarry's office when Elbert B. Lindsey was being questioned about this check. I believe you (Quackenbush) did the questioning.

Q. Now I will ask you to state to the jury what was said by Elbert B. Lindsey in regard to this check that is in question here?

Mr. Donovan: If the court please, I object to the testimony of the witness as to any conversation, or alleged conversations at that time in the police station on the 18th of April, or other times, for the reason that any statements, if made, were made under duress, the defendant not being represented by counsel, and the alleged conversations, if any, were made by this defendant under stress, and under [fol. 13] threats and fear, and any statements made were

made solely by reason of threats of injury to the defendant, and the other defendant was not present.

The Court: Objection overruled.

Exception.

Q. I will ask you to state what the fact is as to any force or threats or duress or anything of that kind in regard to obtaining a statement from Elbert B. Lindsey

A. Absolutely none.

Q. Will you proceed and tell the jury what was said at the time this check was read to Mr. Lindsey?

The Court: That is referring to Exhibit No. 1.

Mr. Quackenbush: Yes.

Q. Was he shown the document?

A. He was shown the document, he was holding the check in his hand and you asked him if it was his father's signature, and he said he didn't know but he was sure his father signed it. He said he didn't see him sign it, but was satisfied that his father had signed it, and he went and cashed it at Peter Jacoy's, and got $40 of which he gave $5.00 to Dr. Countryman and $35 he gave to his father, and he stated that it was his father's money, and that was the reason he gave it to him.

Q. Was there anything said by Elbert as to there being funds in the Spokane & Eastern Trust bank?

A. You asked him and he said he didn't know for sure if there was any funds there, and you asked him if his father told him that he had funds there, and he said, well he may have but he did not recall.

Q. Now calling your attention to a conversation that was had between the defendant E. R. Lindsey and yourself in regard to this same matter, also in Capt. McCarry's office [fol. 14] were you present at that time?

Mr. Carlson: I object as incompetent, irrelevant and immaterial, and not in the presence of the other defendant.

The Court: Objection overruled.

Exception.

A. I was. Capt. McCarry and Alderson were also present; you (Quackenbush) conducted the questioning; there was no threats or force or duress used in any way. Well they asked Mr. Lindsey if he was an attorney practicing

law in the State of Washington and he said he was; you picked up this check and read it off to him and asked him if that was his signature on that check, Exhibit No. 1 and he said there was no question about it being his signature, and that he wrote the check for $40, and you asked him why, and he said there was some one in a jam. He said he didn't care to state who it was for the record. He said he didn't have any funds in the bank.

Cross-examination.

By Mr. Donovan:

A. At the time Elbert B. Lindsey, the son, was being examined by the police officers his father was not present, and he did not have any one there to represent him; he was in jail; I think it was along about noon, or after dinner, if I remember right. At the time Elbert B. Lindsey was arrested we did not have a warrant for him. He was arrested at the Davenport Hotel. His mother was not present when he was examined by the officers. At no time during the examination by police officers or Mr. Quackenbush was his father or mother present. We do not usually ask if a person wants any one present. I don't know how long he was in the Captain's office but as long as it took to make the statement, and then he was taken back to jail. That was on April 18th.

[fol. 15] Q. And you signed a complaint on April 19, against E. R. Lindsey, the father about this mater, in Judge Stocker's court?

A. I think so, yes. I didn't file a complaint against the son. Elbert never had any hearing in the police court as far as I know.

Cross-examination.

By Mr. Carlson:

A. It was the 18th of April that I was discussing with E. R. Lindsey about having funds in the bank.

Q. What was the date you had the son in custody down there?

A. We had them both in custody on the 17th, and the question of the check came up I believe on the 18th. The first time I had any discussion with Mr. E. R. Lindsey was on the 18th. He said he had no funds in the bank.

Q. Did you swear out the complaint on that date for E. R. Lindsey?

A. I don't believe that day I did.

Q. At that time didn't he tell you that he expected to have money in the bank at the time the check came in?

A. He did not make any statement as to that at all.

Witness excused.

CAPT. JAMES MCCARRY, a witness for the State, recalled.

Direct examination.

By Mr. Quackenbush:

I am the same James McCarry that testified before. I was present in my office on the 18th of April, 1935, when each of the defendants was questioned, separately. No threats or force or duress or violence or anything of that kind was used to force statements from either of the defendants.

[fol. 16] Q. Will you tell the jury the substance of the statements made by Elbert B. Lindsey?

A. You handed him the check and he said he cashed the check at Peter Jacoby's, and that his father had signed the check and after he got the cash he paid $5.00 to Dr. Countryman and gave his father $35.00. He said he knew his father didn't have any funds in the bank. He said it was his father's signature on the check.

Q. Now will you give the substance of any statements made by E. R. Lindsey in regard to State's exhibit No. 1?

A. He said that it was his signature on the check; he said that he had no funds in the bank; he said he needed this money for some purpose, but didn't say what the purpose was for the record but that he would probably tell you afterwards. E. R. Lindsey didn't sign any statement. Elbert B. Lindsey signed a statement in my presence.

Cross-examination.

By Mr. Donovan:

Q. Was Elbert B. Lindsey asked anything about his father's financial bank account?

A. No, he was not asked that.

Q. What was done with him after this inquiry?

A. He was taken back to the city jail.

Q. Was there anything else said by the young man relative to this check that you remember of?

A. No.

Witness excused.

[fol. 17] E. VAUGHN KLEIN, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

A. My name is E. Vaughn Klein and I am a vice-president of the Spokane & Eastern Trust Company. I was such during April, 1935. I have made an examination and could not find that E. R. Lindsey had an account there on the 15th of April. I could not find that he had an account there since 1927 or 1928. He had made no credit arrangements with me, and I inquired around amongst the other officers and could not find any one that he had made any such arrangement with.

Witness excused.

H. M. ALDERSON, a witness for the State was sworn and testified:

Direct examination.

By Mr. Quackenbush:

My name is H. M. Alderson; I am a police officer of the city of Spokane and have been for 24 years. I was in Captain McCarry's office on the 18th of April of this year when the defendants E. R. Lindsey and Elbert B. Lindsey were questioned, separately. A. E. Aikman, myself and Captain McCarry were present.

Q. Give briefly any statements made by Elbert B. Lindsey in regard to State's exhibit No. 1?

A. He said he had got the check for $40 from his father and had taken it down to Dr. Countryman's office and tried to cash it; that he paid Dr. Countryman $5.00; but that they didn't cash it for him there; that he later went to Jacoy's and cashed it for $40, and took $5.00 up and paid to Dr. Countryman, and $35 he gave to his father. He said he

[fol. 18] was not positive, but he was reasonably sure his father didn't have an account in the bank.

Q. I will ask you what was said by E. R. Lindsey?

A. Mr. Lindsey said that it was his signature and that he had signed the check, but first he said the boy must have taken it without his permission, and later he said he had given it to the boy and the boy cashed it. He said something about being in a jam, but he would not make any statement or any written statement in regard to it, but he did say that he would like to talk to you (Quackenbush) personally.

Cross-examination.

By Mr. Donovan:

Q. The boy was examined separately from his father?

A. Yes.

Q. Did you have more than one talk with the young man?

A. Yes, we had two or three talks with him, and I think that on one conversation his mother was present, but I couldn't say just when it was. I don't know as they have ever been out of jail since then.

Q. Was there any hearing in police court as far as you know?

A. Well, I was not present at any.

Cross-examination.

By Mr. Carlson:

Q. You know that E. R. Lindsey had been confined in the city jail two days before you showed him this check?

A. Well, I don't know; right around that time.

Witness excused.

Mr. Quackenbush: The State rests.

Jury retires.

[fol. 19] MOTIONS FOR JUDGMENT OF DISMISSAL.

Mr. Donovan: At this time, if the court please, the jury being absent and at the conclusion of the State's case, on behalf of Elbert B. Lindsey I request the court to take the case from the jury, and that judgment be entered dismissing that defendant, on the ground that there is no proof, not sufficient proof to go the jury against the son.

The Court: Motion denied.

Mr. Donovan: Exception.

Mr. Carlson: If Your Honor please, on behalf of the defendant E. R. Lindsey I request at this time that he be dismissed from this case by reason of the fact, that if anything is shown, it is only that he was an accessory in this case, and that the information charges that he obtained the money directly upon this check, and the evidence shows conclusively that at no time did he go to Peter M. Jacoy's and cash the check, and the information is not sufficiently specific against him as an accessory; it is a material variance.

The Court: Motion denied.

Mr. Carlson: Exception.

Jury recalled and opening statements made to the jury.

Mrs. Mayme Q. Lindsey, called as a witness by the defense, was sworn and testified:

Direct Examination.

By Mr. Donovan:

My name is Mayme Q. Lindsey; I am the wife of E. R. Lindsey and the mother of Elbert B. Lindsey.

Q. Do you know whether or not on or about April 12, 13, 14, and 15th of this year Mr. E. R. Lindsey had any money coming to him for legal services performed by him for a mining company?

A. I do.

[fol. 20] Q. Do you know what the amount of the fee was to be?

A. $125 to be paid right away.

Q. From whom was that fee to come?

A. Consolidated Silver Mining Co.

Q. Your husband had incorporated that company?

A. Yes, he was getting the incorporation papers out.

Q. Were you present when there was any conversation with reference of the payment of the fees to him?

A. Yes.

Q. State whether or not you knew that there was to have been a deposit made in the bank on April 15th to your husband's account on account of work done for this mining company?

A. Yes, there was to have been a deposit made in the Spokane and Eastern Trust Company.

Q. Were you present at any conversation in reference to that money being deposited where they said it would be paid on Monday?

A. I had talked to my husband.

Q. After Mr. Lindsey was arrested did any of the incorporators or any of the men interested in the company come to your house and make any payment of the money to you?

A. Yes.

Q. What time was that; how many days after his arrest?

A. I don't recall how many days.

Q. It was while he was in jail?

A. Yes.

Q. Now Mrs. Lindsey when were you first able to see your son in jail?

A. Well, I endeavored to see him—knowing that he had [fol. 21] been ill for a long time I felt that it was quite necessary to see him, as he had been ill for a long time.

Q. When was it that you saw him; how many days after he was put in?

A. I think two days.

Q. And who did you have to go to to get permission to see him?

A. I had to go to the office of the Commissioner of Public Safety, and I believe I went to Capt. McCarry.

Q. You had to go to the Commissioner of Public Safety before you could get to see him?

A. Yes.

Q. Were you ever present when he was examined by the officers?

A. No, I asked permission to be present but it was refused.

Q. State whether or not you were worried about his condition?

A. Yes, he was under the doctor's care for some time.

Cross examination.

By Mr. Quackenbush:

Q. You stated that the Commissioner of Public Safety gave you permission to see Elbert?

A. Yes.

Q. Did you have to see Capt. McCarry to get permission?

A. Not always, whoever was at the desk there; sometimes they refused me entrance, and when they refused me I went around to Capt. McCarry's and walked through his room —got permission from him.

[fol. 22] Q. Isn't it a fact that the officers made arrangements for you to see your son on the 18th? The evening of the 18th?

A. It is possible that I saw him then.

Q. Did I ever refuse you permission to see him?

A. I never asked you because I didn't think you were in charge.

Witness excused.

ELBERT B. LINDSEY, called as a witness by the defense, was sworn and testified:

Direct Examination:

By Mr. Donovan:

My name is Elbert B. Lindsey, I am 25 years old, I live with my parents, and have attended Gonzaga University.

Q. What was your condition of health the past year?

A. Not very good.

Q. Now with reference to this State's exhibit No. 1, the check in question; you have seen this before have you?

A. Yes.

Q. When?

A. It was on Saturday, April 13th of this year.

Q. Where did you see it?

A. On my father's desk where we have some papers, some corporation papers; it was all folded up amongst some corporation papers.

Q. Had you prior to that made a request on your father for money?

A. On the 11th or 12th I told him I had some bills to meet, that were pressing, and I would like to have some money to pay them. I took the check from his desk and went down town on April 13th and went to Dr. Country-[fol. 23] man's office, and from there to Hart & Dillatush's and then went to Peter Jacoys.

Q. When you went from there what did you do with the money?

A. I paid $5.00 to Dr. Countryman, and $10 to the Luncheonette on Sprague and $15 at the White Swan.

Q. Did you make any payment at the Oasis?

A. $10.00

Q. Did you give any of this $40 to your father?

A. No.

Q. Then when you were brought to the police station on the day you were arrested who did you first talk to?

A. The first day I was brought down by Aikman and Alderson and kept there I think it was in Captain McCarry's office. I was rather confused at the time, but I think it was McCarry's office.

Q. Did they interrogate you?

A. Not that day; I think I was down there about five times and then sent back to jail.

Q. Did they tell you what charge there was against you?

A. Not specifically.

Q. Did you make any request at that time for an attorney.

A. Yes, sir.

Q. And were you refused?

A. Yes, sir.

Q. When were you next taken down to the detective department?

A. The next day; that would be the 18th.

Q. Who did you talk to down there?

[fol. 24] A. Officer Aikman took me down there.

Q. Were you taken to Captain McCarry's office?

A. Yes.

Q. Who was present?

A. Capt. McCarry and officers Aikman and Alderson.

Q. Prior to the appearance of Mr. Quackenbush there did you talk to Capt McCarry with respect to this check?

A. They were present when I went into the office.

Q. State if at any time you asked Capt. McCarry or any of the officers to have somebody persent? An attorney?

A. I asked three or four times for an attorney to be present so I could be represented, but I was refused.

Q. What was said by you, if anything, to Capt. McCarry with reference to the date of the check?

A. I told Capt. McCarry it was a post-dated check.

Q. What did he say?

A. He told me he would throw me in jail if I didn't tell the truth.

Q. Now how many times did you tell him it was a post-dated check?

A. Three times.

Q. Was Mr. Quackenbush present at that time?

A. Yes.

Q. State whether or not you told them that several times?

A. I told them my story four or five times and they still didn't believe and they had their own theory and tried to force their theory on me.

Q. Were you arraigned in police court?

A. No.

[fol. 25] Q. When was the first arraignment you had in court?

A. What do you mean by having an arraignment?

Q. I mean when you appeared in any court?

A. I was taken before Judge Stocker on the 19th and he just took a look at me and said $2500 bond.

Q. No testimony was offered?

A. No.

Q. State whether or not the question was asked you at any time while you were in the city jail down there as to your father's bank account?

A. Yes, sir.

Q. What was your answer to the officers?

A. I told them I didn't know anything about his bank account at that time.

Q. At the time when you took the check did you believe that your father had money in the bank?

A. Yes, I did; but I didn't know anything about his affairs.

Cross-examination.

By Mr. Quackenbush:

Q. I want you to tell me whether you were treated unfairly by me at any time in this proceeding?

A. That would be a question whether you treated me unfairly or not. You asked me the questions but when you ask me if you treated me unfairly or not that would be a question.

Q. Isn't it true that I had charge of most of the questioning over there at the station?

A. Yes, but there was also officers Alderson, Aikman and Senseny.

[fol. 26] Q. This state's exhibit No. 1, that is the check we were quizzing you about?

A. Yes.

Q. Was it in my presence or out of my presence that you told Capt. McCarry that it was a post-dated check?

A. I don't recall; I think it was in your presence but I would not be positive of that.

Q. Was it in my presence or out of my presence that you say that you requested three or four times for an attorney?

A. It was in your presence.

Q. Now I show you state's exhibit No. 2 for identification and ask you to examine and state what that is?

A. That is my signature.

Q. Read it over?

A. I signed it for the reason that I was brought down there and it was shown me and I read it and I told you it was not what I said, but they said to me "there is five to one" against you and when you get into court if you don't sign it it will be used against you.

Q. Who said that?

A. Either McCarry or Aikman or Alderson.

Q. What else did they say?

A. And they said it didn't make any difference whether I signed it or not "we will gang up on you in court" and there is five of us to one of you.

Q. You did sign it?

A. Yes.

Q. That is your signature?

A. Yes.

[fol. 27] Q. This statement was taken on the 18th?

A. Yes.

Q. And signed on the 19th?

A. Yes, but you had it all the while.

Q. Is there anything in that statement to the effect that you told any of us that it was a post-dated check?

A. No, not in that part.

Q. Did you at any time request to have that statement inserted in the statement that you finally signed on the 19th?

A. I didn't even look at it when I signed it; I just glanced at the first page. It is not what I said, but somebody said, "there is five against one and it didn't make any difference

whether I signed it or not, as we will go into court and testify against you anyway."

Q. What did they do to compel you to sign the statement against your will?

A. There was no actual physical threats, at that time.

Q. What other kind of threats were there?

A. Do you want me to explain everything?

Q. Yes, go ahead and tell everything?

A. Well, I started in and told Capt. McCarry that it was a post dated check and he said "I will throw you back in the cell."

Q. I asked you to tell what threats were used to compel you to sign the statement?

A. Well, they threatened to come over and testify five to one against me if I didn't.

Q. Then why did you sign the statement, Elbert?

A. Well, I got tired of fighting them for two days and I decided that I would sign it.

[fol. 28] Q. Who did you fight with for two days?

A. McCarry and Alderson and Aikman.

Q. Was I there for two days?

A. You were there a part of the time.

Q. Was I there on the 19th?

A. No, not when it was signed.

Mr. Quackenbush: I offer state's exhibit No. 2 for identification in evidence.

Mr. Donovan: At this time I object as incompetent, irrelevant and immaterial and not tending to contradict or impeach the witness, and as having been obtained under duress.

The court: Objection over-ruled. It may be admitted.

Mr. Donovan: Exception.

(State's exhibit No. 2 admitted and marked.)

State's exhibit No. 3 marked for identification.

Q. Have you ever been convicted?

Mr. Donovan: I object. There is pending in the Supreme Court an appeal from the matter he is inquiring about, and while that question of appeal is pending it is improper at this time to attempt to use a conviction in the Superior Court when the case is pending on appeal and the conviction will not be complete until the Supreme Court has passed upon the questions involved.

The Court: Objection overruled.
Mr. Donovan: Exception.

Q. I hand you state's exhibit No. 3 for identification and ask you if you are the party referred to in that instrument?
A. Yes, I am.

[fol. 29] Mr. Quackenbush: I offer state's exhibit No. 3 in evidence.
Mr. Donovan: Same objection.
The Court: Objection overruled.
Mr. Donovan: Exception.

(State's exhibit No. 3, commitment of Elbert B. Lindsey received in evidence and marked.)

Mr. Quackenbush: Reads said exhibit in full to the jury.

Q. Now Elbert you say you got hold of this check on what day?
A. The 13th.
Q. Do you know what time of the day or week it was?
A. It was on Saturday.
Q. You heard the testimony of Mr. Jacoy and Mr. Morrison that it was on Monday the 15th?
A. Yes.
Q. You took this check and went down to Dr. Countryman's office?
A. Yes.
Q. About what time?
A. About 4:30 April 13, 1935.
Q. Did he tell you to go to Hart & Dillatush?
A. Yes.
Q. And what happened at Hart & Dillatush in regard to the check?
A. They said they didn't have sufficient funds to pay the $40.
Q. And from there where did you go?
A. From there I went—turned North on Stevens street, and went to the corner and started across there.
[fol. 30] Q. And there you met your father?
A. Yes.
Q. Did you know he was going to be there?
A. No.
Q. Did you at that time tell him you had the $40 check with you?
A. No.

Q. Did he at that time tell you that he had made out the $40 check for you?

A. I don't think he ever told me he had; he had told me he would make out a check.

Q. When you met your father on the street did you tell him at that time that you had the $40 check and that you were about to cash it?

A. No.

Q. You were then on your way up to Peter Jacoy's to get the check cashed?

A. Yes.

Q. When you met your father you said nothing about the check?

A. I spoke to him about another matter and about that time he went on into a building and I went on.

Q. Then you did go up to Peter Jacoy's with the check and cash it?

A. Yes.

Q. Now you say you had some bills that were pressing?

A. Yes.

Q. And what did you say about the $15 you paid to the White Swan?

A. Yes, I paid that.

[fol. 31] Q. And was that for a bad check?

Mr. Donovan: Wait a minute; I object to that.

Overruled. Exception.

Q. What was that money paid up to the White Swan for, for some payment on a bad check?

A. Yes, I owed them a certain amount of money and that was on account.

Q. That was on account of some check that you had given them for some $44 signed by you, a check against which you had no funds?

A. It was a post-dated check.

Q. You said you paid $5 to Dr. Countryman and $10 to the Oasis?

A. Not at the Oasis but at the cigar store there.

Q. What was that for?

A. For money that I owed there.

Q. Where is the Luncheonette?

A. On Sprague Avenue across from the Chronicle.

Q. What was that for there?

A. It was for money I owed there.

Q. On a check?

A. I am not sure.

Q. You cannot say what the nature of the deal was with the Luncheonette?

A. No.

At this time an adjournment was taken until 9:30 a. m. September 14, 1935, at which time the case was resumed, all parties being present.

[fol. 32] Elbert B. Lindsey still on the stand.

Cross-examination continued.

By Mr. Quackenbush:

Q. About what time was it you went to Jacoy's?

A. I could not say positively.

Q. When was it you paid $5.00 to Dr. Countryman?

A. On Monday.

Q. Did you get a receipt at that time?

A. I believe so; I am not sure.

Q. Isn't it true you went right back from Jacoy's to Dr. Countryman and paid him?

A. I am not certain whether I paid it that day, on Saturday, or on Monday—or whether I went back that night on another matter.

Q. Well, now, the 13th of April would be on what day of the week?

A. Saturday.

Q. And Monday would be the 15th?

A. Yes.

Q. What period of time would you say you were up there before you went to Hart & Dillatush?

A. About 10 minutes.

Q. So you want to say to this jury that it was on Saturday afternoon, April 13—approximately what time would you say you were at Dr. Countryman's?

A. About 5 or it might have been 5:15.

Q. You want to leave your story that way?

A. Yes.

Witness excused.

[fol. 33] E. R. LINDSEY, one of the defendants, called on behalf of the defense, was sworn, and testified:

Direct examination.

By Mr. Carlson:

Q. State your name, residence and occupation?

A. My name is E. R. Lindsay, I live at 1104½ W. 2nd Avenue, Spokane. I have lived in Washington since 1909; I am an attorney at law; have been practicing since 1918, and before that time I was a court reporter for many years. Just prior to April 13, 1935 I organized a corporation, did the legal work, called the Continental Consolidated Silver Mining Co. Its property was up near Twisp, but one of the men lived down in Whitman County, and about that time one or two of the men were down here and the rest were up at the mine; I don't know whether they had any permanent place of business here but one of them lived down in the country; I was their attorney; I was their attorney and they were to pay me $250 for organizing the company; $125 was to be paid immediately and the balance at $25 per month. A man named Widman at that time was Treasurer and handled the money; Widman lived down near Rosalia.

Q. Prior to April 13, 1935 did you have any conversation with Mr. Widman abont the payment of this fee?

A. Yes. I told him I was going out of town, that I had arranged to go to Sandpoint to perfect an appeal in a case I had up there. I expected to go out of town on Friday and if I perfected the appeal matter at Sandpoint I then expected to go over to the other side of the lake and look after some other matters over there. There was some discussion as to how he would get the money to me where I could reach it and arrange for it while I was away, and he told me he would—that he was banking at the Spokane [fol. 34] and Eastern Trust Company and could send it there and I asked if there was some way it could be placed to my credit, as I didn't know any other way I could get at it, and he said he would see to it that it was left there where I could get it, placed to my credit. He said he would be going through either Saturday or Sunday, and he would either bring it or send it so that it would be there for me either on Saturday or Sunday.

Q. Did it arrive there on Saturday or Sunday?

A. I found ont afterwards that it did not.

Q. What did you do after you found out the money had not yet arrived?

A. Some other matters came up and I did not go to Sandpoint, and so I called him up on long distance telephone. That was on Sunday and he said he would be up with it at 10:00 o'clock on Monday. That would be the 15th. He came in and told me he had the money but could not pay it out then; that they were having some trouble up at the mine to pay off some of the men; I think that two of them were there when he talked to me, and they were going to make trouble if they didn't get their pay, and he would have to go up to the mine to see how much money he would have to pay out, and he left that morning and went somewhere up there, I don't know where.

Q. Where is the mine located?

A. I have never been up there but they told me it was up near Twisp; Twisp is the nearest town as I understood.

Q. I will ask you to state whether it is not fact that on the 12th day of April you were supposed to have a case in Sandpoint, Idaho?

[fol. 35] A. I had a case there that I had tried and was perfecting the appeal on Friday of Saturday, I have forgotten which date. I had sent to the stenographer for the record, and the next day was the last day I had before I could perfect the appeal and get out the transcript, and then I could appeal to the Supreme Court.

Q. That was on the 12th?

A. I think the appeal was returnable on the 11th; either Friday or Saturday, one of those two days but I could not tell you without looking at the record.

Q. You may state whether or not it is a fact that you had some conversation with your son relative to some bills of his that he wanted you to advance him some money on?

A. He asked me, I think it was Friday, possibly it was Thursday, he asked me if I could let him have some money, that he needed some money, but he didn't say what he needed the money for. I believe it was on Thursday as near as I can recall.

Q. What did you tell him about it?

A. When I prepared my papers to go to Sandpoint I drew a check and put it with my papers but I didn't show it to him or tell him anything about it. My intention was if I went there to Sandpoint) when I am out of town I

always telephone down every night when I can reach a phone, and if I could get word from Mr. Widman that the money was there, I would then tell him to go ahead and cash the check.

Q. Is this State's exhibit No. 1 the check you made out and left there?

A. Yes, that is the check.

Q. Did you ever at any time tell anybody about it, or tell Elbert B. Lindsey, your son?

[fol. 36] A. No, I never told anybody I had made it out.

Q. How did the check get into his possession?

A. That I do not know.

Q. Where was the check left did you say?

A. On my desk in the apartment where I live.

Q. Did Elbert B. Lindsey have access to the Corporation papers?

A. Yes, he can look them over, as there was nothing to prevent him.

Q. Now when was the first notice that you had of the fact that the check had been issued to somebody? Or that somebody had it besides yourself?

A. I believe on April 18th, if my memory is correct; the day after I was arrested.

Q. And was this check presented to you by some police officers at that time?

A. Yes.

Q. State to the jury what they said to you when they presented the check? And you said to them?

A. I told them I was very much surprised.

Q. Something has been said during this trial about your meeting your son down there, do you have any recollection about that?

A. I don't recall any particular time I met him. I was out a good deal of the time and I frequently met him when I was down town, but I don't specifically remember meeting him this time.

Cross-examination.

By Mr. Quackenbush:

Q. You have stated that you told the police officers about your surprise that this check was out; was that some time [fol. 37] when I was present or some other time?

A. Well, Mr. Quackenbush, I could not say; they brought

me down and interrogated me so many times, I don't know whether you were present or not.

Q. How many occasions was there that I was present?

A. That I couldn't tell you either. I was down there eight or ten times—I could not say how many times; some days they had me down there three or four times.

Q. Do you recall one occasion when I was present on the 18th of April?

A. I think you were there on the 18th of April, yes.

Q. You made quite a 9 or 10 page statement to me at that time?

A. Well, there was parts of what I said taken down, but it didn't show much of what I said.

Q. There were at least 9 or 10 pages, wasn't there?

A. I think he took down quite a lot.

Q. That was taken in shorthand by Roy Meyers who works in the Commissioner's office?

A. I don't know who he is.

Q. A crippled fellow?

A. I think he is a lame fellow, yes.

Q. Did I inquire of you in regard to this check on the 18th of April?

A. Yes, there was some talk about it then.

Q. Just answer the question?

A. I could not tell—whether you inquired or not; there were 9 or 10 police officers in there and you were all talking at once.

[fol. 38] And yelling "don't lie to me" and don't do this and that. It was pretty warm sometimes. Were you there when Capt. McCarry called me a liar when I said I was a lawyer?

Mr. Quackenbush: I was not there then but I heard about it later.

A. Or was it the time they took some stuff out of another box and tried to call me a liar because I said I never had seen it, and then discovered their mistake?

Mr. Quackenbush: I don't remember about that.

Q. Now coming back to the question; did I inquire of you in regard to this State's exhibit No. 1?

A. I don't know; I couldn't say that you asked me about that.

Q. Will you answer the question, yes or no, whether I inquired about it or not?

A. I couldn't say, now.

Q. Would it refresh your recollection if I showed you this paper that was drawn up there (handing paper to witness.)

A. Yes, that is part of what was said there.

Q. I will ask you whether or not I inquired in regard to this check?

A. I can now say there were some questions.

Q. I will you answer my question, yes or no?

A. I am saying I cannot tell you who was talking as there were so many officers there.

Q. I had charge of the questioning that day, did I not?

A. No, I don't know whether you had charge of it or not, as there were 8 or 10 officers there.

Q. You say there were 8 or 10 officers?

A. Most of them were strangers to me. Aikman was [fol. 39] there some of the time—I think most of the time and Alderson was there some and Capt. McCarry was there sometimes.

Q. Were they all asking questions at the same time?

A. Sometimes they were.

Q. I will ask you whether I asked you this question, showing you the check, "April 15, 1935. Spokane Eastern Trust Co. Pay to the order of Elbert B. Lindsey $40. E. R. Lindsey," and asked you if that was your signature, and you said that it was your signature?

A. Yes, I answered that.

Q. Did I ask you this question: "The fact is you had no account in the Spokane and Eastern Trust Co." and you answered, "I have not."?

A. Yes.

Q. Now Mr. Lindsey at that time or at any other time did you tell me or any other police officer the story that you have told on the witness stand as to how the check was put in circulation?

A. I told them——

Q. Answer the question?

A. I say I didn't make any statement about the check.

Q. Just answer the question?

A. I am trying to give the conversation as near as I can remember it.

Q. Was Aikman and Alderson present at this time?

A. I don't know as I would want to say as there was quite a number of police officers there. I didn't know them all.

Q. Can you give a description of them so we can find out who they are?

[fol. 40] A. I could not—as I don't know them personally.

Q. I asked if Capt. McCarry and A. E. Aikman and H. M. Alderson were at all of the meetings you had with the police officers if myself or one of those three were there at every meeting?

A. They were at some meetings.

Q. Can you answer yes or no?

A. No I could not say for sure.

Q. Who seemed to be acting as if they had charge of the meeting?

A. No one seemed to be taking a greater part than any of the others.

Q. Will you say whether two or three of the men I have mentioned were present at the time you made this statement about putting this check in circulation?

A. I would not say.

Q. You knew that those were the men that had charge of the case?

A. I didn't know that.

Q. What other officers questioned you besides Capt. McCarry and Aikman and Alderson?

A. I don't know who all they were.

Q. Did you ever tell me the story you have told here as to how you made this check out?

A. No I never had a chance.

Q. How many times have you seen me since the 18th of April?

A. Well, the 3rd of May I first saw you over here.

Q. Now Mr. Lindsey have you ever been convicted of crime?

Mr. Carlson: I make the same objection as before.

Overruled. Exception.

[fol. 41] A. I have.

Q. I hand you a paper marked State's exhibit No. 5 for indentification and ask you if you are the party referred to in that instrument?

A. I assume I am; that is my name.

Mr. Carlson: I object as incompetent, irrelevant and immaterial.

Overruled. Expection.

Mr. Quackenbush: I offer State's exhibit No. 5 in evidence.

Mr. Donovan: We object as incompetent, irrelevant and immaterial.

The Court: Objection overruled. Exception.

(State's exhibit No. 5 admitted in evidence, being a commitment of E. R. Lindsey.)

Mr. Quackenbush read the exhibit to the jury.

Q. Now what day or date was it your son Elbert asked you for money?

A. My best recollection is that Thursday would be the day.

Q. That would be the 11th?

A. It might have been Wednesday.

Q. Elbert had been living at home all the time with you?

A. Yes, he lives there.

Q. Both of you under the same shelter?

A. Both live in the same apartment house.

Q. How soon thereafter was it that you wrote this check that is in evidence here?

A. My memory is I got my papers ready on Thursday, as I intended to go to Sandpoint on Friday morning.

Q. That is your signature to this exhibit?

A. I have so testified.

[fol. 42] Q. At the time you wrote the check did you have any account in the Spokane and Eastern Trust Company at Spokane, Wash.?

A. Not on that date.

Q. Did you have any account there on the 12th of April?

A. No.

Q. Did you have any account there on the 13th of April?

A. No.

Q. Did you have any account there on the 14th of April?

A. I did not, as it turned out.

Q. Did you have any account there on the 15th of April?

A. It turned out I did not.

Q. Well did you?

A. No.

Q. Did you have during April 1935 any arrangement with any officer of the Spokane and Eastern Trust Company for any line of credit against which you could issue checks?

Mr. Donovan: I object as immaterial and incompetent.

Objection overruled. Exception.

A. No.

Witness excused.

Mr. Donovan: Defendant Elbert B. Lindsey rests.
Mr. Carlson: Defendant E. R. Lindsey rests.

[fol. 43] Prosecution in Rebuttal.

CAPT. JAMES MCCARRY, recalled by the State, already sworn.

Direct examination.

By Mr. Quackenbush:

Q. There has been testimony here, Captain, and statements were made that police officers other than yourself and officers Aikman and Alderson went into this matter; now you may state whether or not there were any other officers in it besides yourself and Aikman and Alderson?

A. No, I don't believe there was.

Q. There has been testimony of E. R. Lindsey that he told the police officers that he issued this check on April 11th or possibly the 12th I think; that on Thursday the 11th this check was placed in his office files; what would you say as to whether that statement was made by E. R. Lindsey?

A. No.

Q. Now as to the son Elbert B. Lindsey, he testified that he told the police that this check, exhibit 1, was a post-dated check?

A. No, he never told me that.

Q. Were you present when the statement was made by Elbert B. Lindsey, also when it was signed?

A. I was.

Q. I will ask you if there was any compulsion of any kind used on him in getting him to sign the statement?

A. No, there was not.

Witness excused.

[fol. 44] A. E. AIKMAN, a witness for the prosecution, recalled, already sworn.

Direct examination.

By Mr. Quackenbush:

Q. I will ask you if you were present on the occasion when the elder Mr. Lindsey was questioned?

A. I was.

Q. I will ask you if on any of those occasions he told the story that he wrote this check on April 11th and placed it in his papers?

A. No, he never made that statement.

Witness excused.

DR. C. W. COUNTRYMAN, a witness called by the State in rebuttal, was sworn and testified:

Direct examination.

By Mr. Quackenbush:

A. My name is Dr. C. W. Countryman with offices in the Paulsen Medical-Dental building. I know E. R. Lindsey and Elbert B. Lindsey.

Q. Do you recall a visit to your office by Elbert B. Lindsey?

A. I do.

Q. In the spring of this year?

A. Yes.

Q. Will you tell the jury what day that was?

A. It was on Monday, April the 15th.

Q. And what was the call in connection with?

Mr. Donovan: I object as immaterial and irrelevant.

Objection overruled. Exception.

A. He brought in a check for $40 made out to himself and said that it had been signed and that it was his father's check, and wanted to make a payment of $5.00 on account.

[fol. 45] Cross-examination.

By Mr. Donovan:

Q. How do you fix the date as to when Elbert was there with the check?

A. Because he came back within an hour and paid $5.00 to my secretary on account.

Q. Did you give him credit on his account?

A. Yes.

Q. Payment was made to you?

A. No, to my secretary.

Q. Did you make any notation as to when that payment was made?

A. No, only so far as I remember it was late in the afternoon.

Q. It might have been on Saturday?

A. It would have been impossible because I am out of my office Saturday afternoons.

Q. You were not there on Saturday afternoon the 13th?

A. No.

Q. Will you say doctor that during the time you have been practicing you never have been in your office Saturday afternoons?

A. I have never been in my office on Saturday afternoon after 1:00 o'clock or 1:15 at any time.

Witness excused.

Mr. Quackenbush: The State rests.

Mr. Donovan: Nothing further.

Mr. Carlson: We rest.

Jury excused.

[fol. 46] MOTIONS TO DISMISS, ETC.

Mr. Carlson: Comes now the defendant E. R. Lindsey, at the close of all the evidence and renews his motion to dismiss as to him, or in the alternative that the court direct the jury to return a verdict of not guilty on the following grounds:

(1) That there is a fatal variance between the charge in the information and the proof adduced at the trial.

(2) That the evidence fails to show any act on the part of the defendant towards the commission of the crime charged.

(3) That the evidence fails to show any intent to defraud and there is not even any evidence on which an inference of intent could be based.

(4) That neither the law nor the evidence would justify the jury in returning a verdict of guilty against this defendant.

(5) That any verdict so returned would be contrary to the evidence and not supported by any evidence.

(6) That all the evidence in the case would not warrant a verdict of guilty against this defendant.

Mr. Donovan: Without repeating it, I make the same motion on all the same grounds as to the defendant Elbert B. Lindsey.

The Court: Each of the motions is denied.
Mr. Carlson: Exception.
Mr. Donovan: Exception.

[fol. 47] In Superior Court of Spokane County

Certificate of Judge

State of Washington,
County of Spokane, ss:

I, Chas. H. Leavy, Judge of the Superior Court for Spokane County, Washington, and the Judge who tried the above entitled cause, to-wit: State of Washington, plaintiff, vs. Elbert B. Lindsey and E. R. Lindsey, No. 11046 of the said Superior Court, do hereby certify that the above and foregoing statement of facts contains all the material facts, matters and things heretofore occurring in said cause, and not already a part of the record therein, and that the facts and matters stated therein were facts and matters occurring at the trial of said cause; and that said statement of facts contains all the material evidence, both oral and in writing, except the exhibits; that Plaintiff's exhibits Nos. 1, 2, 3 and 5 were introduced at the trial of said cause, and that either the originals or certified copies of all said exhibits accompany this statement of facts and are hereby made a part hereof; that said statement of facts was duly and regularly served and filed within the time authorized by law, and that no amendments were proposed or made to said statement except such as appear therein; that due and regular written notice was given the plaintiff of the time and place of settlement and certifying said statement of facts, as is required by law and rules of court.

Done at Spokane, Wash, this 31 day of Dec. 1925.

Chas. H. Leavy, *Judge.*

[fol. 48] CASE No. 11046. ADMITTED PLAINTIFF'S EXHIBIT No. 1 FOR IDENTIFICATION

Member Federal Reserve System
Spokane, Wash., Apl. 15, 1935. No. 21.

28-4—Spokane and Eastern Trust Company—28-4

Pay to the order of Elbert B. Lindsey, $40.00.
Forty 00/..... Dollars
E. R. Lindsey.

Endorsed on Back

Elbert B. Lindsey
1104½ W. 2nd Ave.,
Co-Service National Guard.

M.S.D. Prop # 15822.

Pay The Washington Trust Co.,
Spokane, Wash. Or Order
Peter M. Jacoy

In Evidence
4-19-35. D.

J. McC.

[Stamp:] Washington Trust Co. Paid Apr. 17, 1935, Through Clearing House, Spokane, Wash. 28-8 Cancelled.

[fol. 49] CASE No. 11046. PLAINTIFF'S EXHIBIT No. 2 FOR IDENTIFICATION. ADMITTED

Elbert B. Lindsey

4:20 p. m., April 18, 1935.

Capt. McCarry, C. C. Quackenbush, A. E. Aikman, H. M. Alderson, James McCluskey

STATE OF WASHINGTON,
County of Spokane, ss:

Quackenbush: What is your name?

A. Elbert B. Lindsey.
Q. What is your address?
A. 1104½ West Second Avenue.
Q. You are the son of E. R. Lindsey, is that correct?
A. Yes.

Q. Now this check, dated April 15, 1935, No. 21, Spokane & Eastern Trust Co., • • • pay to the order of Elbert B. Lindsey $40.00, signed • • • E. R. Lindsey; that check was signed by your father—is that true?

A. I didn't see it signed, but I know it was.

Q. And of the $40.00 received from Peter M. Jacoy, $5.00 you paid to Dr. C. W. Countryman and $35.00 was paid to your father, E. R. Lindsey?

A. Yes.

Q. You knew at the time that he had no account at the Spokane & Eastern Trust Company?

A. I was fairly certain that he didn't.

Q. He told you in fact that he didn't have any account there, and you knew it, isn't that true?

A. Yes—he might have told me but I cannot recall.

Q. On this $40.00 check of April 15, 1935, you had an understanding with your dad that you were to return him this $35.00?

[fol. 50] A. Yes, that was my understanding, exactly and it was his money not mine.

I make this statement voluntarily, without duress, knowing that the same may be used against me.

(Signed) Elbert B. Lindsey.

Subscribed and sworn to before me this 19th day of April, 1935. Geo. M. Johnson, Notary Public. (Seal.)

[fol. 51] Case No. 11046. Plaintiff's Exhibit No. 3 for Identification. Admitted

In the Superior Court of the State of Washington for Spokane County

Case No. 11045.

The State of Washington, Plaintiff,

vs.

Elbert B. Lindsey, Defendant

Judgment, Sentence and Commitment Upon Verdict of Guilty

Reformatory

On this 10th day of July, 1935, the above named defendant came into open Court for pronouncement of judg-

ment and sentence, and being asked by the Court if he had any legal cause to show why judgment of this Court should not be pronounced in his case, he makes his statement, the defendant being represented by E. R. Lindsey and L. J. Birdseye his counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Attempted Grand Larceny, as to Count I, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant Elbert B. Lindsey be punished by confinement in the Washington State Reformatory, for a term of not more than 7½ years, (Seven and one half years) and shall pay the costs of this prosecution taxed at $51.95.

[The said sentence to run Concurrently, Consecutively.]*

That said defendant shall stand committed to said institution until this sentence is complied with

It is the further order of the Court that——.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 10th day of July, 1935.

E. V. Kuykendall, Judge.

Filed Jul. 10, 1935, Frank C. Nash, Clerk.

Certificate

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington, for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open Court while the defendant was personally present.

[* Matter enclosed in brackets, struck out in copy.]

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 13 day of September, 1935.

Frank C. Nash, Clerk. W. C. Steinmetz, Deputy.
(Seal.)

Reformatory Verdict of Guilty.

[fol. 52] CASE NO. 11046. PLAINTIFF'S EXHIBIT NO. 5 FOR IDENTIFICATION. ADMITTED

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

Case No. 11045.

THE STATE OF WASHINGTON, Plaintiff,

vs.

E. R. LINDSEY, Defendant

Judgment, Sentence and Commitment Upon Verdict of Guilty

Penitentiary

On this 10th day of July, 1935, the above named defendant came into open Court for pronouncement of judgment and sentence, and being asked by the Court if he had any legal cause to show why judgment of this Court should not be pronounced in his case, he makes his statement, the defendant being represented by E. R. Lindsey and L. J. Birdseye his counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Attempted Grand Larceny, as to Count I, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant E. R. Lindsey be punished by confinement in the Washington State Penitentiary, for a term of not more than 7½ years, (Seven and one half years) and shall pay the cost of this prosecution taxed at $51.95.

[The said sentence to run Concurrently, Consecutively.]*

That said defendant shall stand committed to said institution until this sentence is complied with.

[* Matter enclosed in brackets, struck out in copy.]

It is the further order of the Court that——.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 10th day of July, 1935.

E. V. Kuykendall, Judge.

Filed Jul. 10, 1935, Frank C. Nash, Clerk.

Certificate

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington, for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open Court while the defendant was personally present.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 13 day of September, 1935.

Frank C. Nash, Clerk. W. C. Steinmetz, Deputy.
(Seal.)

Penitentiary Verdict of Guilty.

[fol. 53] [File endorsement omitted]

IN SUPERIOR COURT OF SPOKANE COUNTY

No. 11046
[Title omitted]

INSTRUCTIONS TO JURY—Filed September 14, 1935

Ladies and Gentlemen of the jury:

Statement of the Case

This is a criminal case wherein the State of Washington is the plaintiff, and Elbert B. Lindsey and E. R. Lindsey,

are the defendants. The defendants are charged by an information filed herein by the Prosecuting Attorney, with the crime of Grand Larceny committed as follows:

"That the said defendants, Elbert B. Lindsey and E. R. Lindsey, in the County of Spokane, State of Washington, on or about the 15th day of April, 1935, then and there being, did then and there wilfully, unlawfully, feloniously and fraudulently, by color and aid of a check in words and figures as follows: to-wit:

Spokane, Wash., Apl. 15, 1935. No. 2.

Spokane and Eastern Trust Company

Pay to the order of Elbert B. Lindsey $40.00

Forty 00/ ..... Dollars

E. R. Lindsey."

and endorsed on the back thereof: "Elbert B. Lindsey, 1104½ W. 2nd Ave. Co. Service National Guard"

obtain from Peter M. Jacoy Forty Dollars ($40.00) in money and currency of the United States of America of the value of Forty Dollars, and the property of the said Peter M. Jacoy, with intent to deprive and defraud the said Peter M. Jacoy, the owner thereof, the said defendants then and there knowing that the maker and drawer of said check was not authorized or entitled to make or draw the same."

[fol. 54] Instruction No. 1

To this information the defendants Elbert B. Lindsey and E. R. Lindsey, have entered a plea of not guilty, which puts in issue each and every material allegation of the information.

I instruct you that the defendants are presumed to be innocent of the crime with which they are charged, and that presumption attaches to and continues with them throughout all stages of the trial, and throughout all stages of your deliberations, and until it has been met and overcome by the evidence in the case, beyond a reasonable doubt.

This presumption is a part of the law of the land to which the defendants are entitled, and unless this presumption is overcome by the evidence in the case beyond a reasonable doubt, you must acquit the defendants.

The fact that an information is filed against the defendants, constitutes no evidence of their guilt. That is merely the formal instrumentality provided by the law as a means of bringing a defendant to trial and subserves such purpose alone. His guilt must be proved independently of that. In arriving at a verdict, therefore, you will give no consideration to the fact that the defendants have been informed against as tending in any way to establish their guilt.

Instruction No. 2

The jury are instructed that the burden is on the State of proving every fact material and necessary to a conviction by competent evidence, beyond a reasonable doubt. It is not sufficient that the State should prove these facts by a mere preponderance of the testimony, nor, on the other hand is it necessary that it should prove them conclusively [fol. 55] in such manner as to leave no room for any doubt whatever. Very few things in the whole domain of human knowledge are susceptible of absolute proof. We can have a moral certainty, which may vary in degree, but rarely an absolute certainty.

The expression "reasonable doubt" means in law just what the words imply—a doubt founded upon some good reason. It must not arise from a merciful disposition or a kindly, sympathetic feeling, or a desire to avoid performing a disagreeable duty. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt, such as an honest, sensible and fairminded man might with reason entertain consistently with a conscientious desire to ascertain the truth.

You must use your common sense as men and women of experience possessing some knowledge of worldly affairs, and if, after examining carefully all the facts and circumstances in this case, you can say and feel that you have a settled and abiding conviction of the guilt of the defendants, then you are satisfied of their guilt beyond a reasonable doubt. If you have not such a conviction, then you should acquit them.

Instruction No. 3

You will note that in this case there are two defendants charged jointly, and you are instructed that the burden

rests upon the State of establishing by the evidence, beyond a reasonable doubt, to your satisfaction, the guilt of each defendant, as an independent fact. Therefore, if you should find from the evidence, beyond a reasonable doubt, that the State has established the guilt of one of the defendants, it would not necessarily follow that the other [fol. 56] defendant was guilty, but the burden rests upon the state to establish that fact as to each defendant.

Instruction No. 4

You are instructed that the laws of the State of Washington, (Remington's Compiled Statutes 2601—2, provide as follows:)

"Any person who shall with intent to defraud make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full upon its presentation, shall be guilty of larceny. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of such check or draft, and the uttering or delivery of such a check or draft to another person, without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud."

You are further instructed that the laws of the State of Washington, Section 2601, sub-division 2 provide as follows:

"Every person who, with intent to deprive or defraud the owner thereof—shall obtain from the owner • • • the possession of • • • personal property by color and aid of any order for the payment or delivery of property or money or any check, knowing the maker or drawer of such check was not authorized or entitled to make or draw the same, steals such property and shall be guilty of larceny."

Instruction No. 5

You are instructed that before you can convict the defendant E. R. Lindsey, you must find from the evidence beyond a reasonable doubt:

(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, he made the check described in the information herein and delivered it to his son, Elbert B. Lindsey, co-defendant herein.

(2) That the making and delivery of said check, if any, by said E. R. Lindsey was with an intent to defraud some person, or persons.

(3) That at the time of the making and delivery, if any, [fol. 57] said E. R. Lindsey knew that he did not have either funds or credit with the Spokane and Eastern Trust Company, the bank upon which it was drawn, to meet said check upon its presentation.

If you find each of the foregoing elements in this case to have been established by the evidence beyond a reasonable doubt, then you would find the defendant E. R. Lindsey guilty as charged in the information. If, on the other hand, the State has failed to prove each of the foregoing elements to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant E. R. Lindsey.

You are instructed that as to the defendant, Elbert B. Lindsey, before you can find him guilty of the charge contained in the information herein, you must find from the evidence beyond a reasonable doubt:

(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, said Elbert B. Lindsey, by color and aid of the check here in question, obtained from Peter M. Jacoy, the sum of Forty Dollars in currency of the United States.

(2) That at the time said Elbert B. Lindsey presented said check to Peter M. Jacoy, and obtained the money thereon, he knew that the drawer and maker thereof had not sufficient funds, or had not made credit arrangements with the Spokane and Eastern Trust Company, the bank upon which the check was drawn.

(3) That said defendant Elbert B. Lindsey, in procuring payment on said check from Peter M. Jacoy, did so with the intent to deprive and defraud said Peter M. Jacoy of his property, towit: Forty Dollars, currency of the United States.

If the State has established each of the foregoing elements by evidence in this case to your satisfaction, and beyond a reasonable doubt, then you should convict said [fol. 58] defendant Elbert B. Lindsey. On the other hand, if the State has failed to establish each of the foregoing elements beyond a reasonable doubt, then it would be your duty to acquit said defendant, Elbert B. Lindsey.

Instruction No. 6

You will note from the instructions heretofore given you herein that the specific charge upon which the defendant E. R. Lindsey is being tried, is that of issuing the check in question, with an intent to defraud, knowing at the time of the issuance of said check that he had neither sufficient funds, nor credit with the bank upon which it was drawn.

As to the defendant Elbert B. Lindsey, the specific charge contained in the information against him is that with an intent to deprive and defraud the owner thereof, he obtained from Peter M. Jacoy the sum of Forty Dollars by color and aid of the check in question herein, knowing at the time he so obtained the money that E. R. Lindsey, the maker of said check, neither had funds in the bank upon which it was drawn, nor had credit arrangements with said bank, sufficient to meet it when it would be presented.

If the state has established these charges as to each of the defendants herein by the evidence in this case beyond a reasonable doubt, then you should convict the said defendants. If, however, you are satisfied from the evidence beyond a reasonable doubt as to one defendant and not satisfied as to the other, then you should acquit the one and convict the other; and if the State has failed to establish by the evidence beyond a reasonable doubt the foregoing facts, as to either defendant, then you should acquit both *both* defendants.

[fol. 59] Instruction No. 7

The jury are instructed that pretenses made by either defendant, even though made falsely are not sufficient to constitute the offense charged; that in order to find the defendants, or either of them guilty, there must be a false pretense, knowingly made, coupled with a criminal intent, at the time of making the false pretense, if you find beyond a re-sonable doubt that any false pretenses were made.

You are further instructed that the intent of one defendant, cannot be imputed to the other, but that each defendant must be judged according to his own intent.

Instruction No. 8

You are instructed that the intent with which an act is done is a mental process, and as such generally remains hidden in the mind where it was conceived, and is hardly, if ever, susceptible of proof as direct evidence, but must be inferred or gathered from the outward manifestations, and by the words and acts of the party entertaining it, and the facts and circumstances surrounding and attending upon the act which said party is charged to have been connected.

You are further instructed that the intent of one defendant, when two defendants are being tried together, cannot be imputed to the other, but that each defendant must be judged according to his own intent.

Instruction No. 9

If you find from the evidence in this case beyond a reasonable doubt that the defendants did commit the crime as [fol. 60] charged in the information, then any payment or offer of payment of the amount of such check by the defendants or any other person afterwar*fs* cannot be considered as any defense in this case.

Instruction No. 10

The jury are instructed that as to any evidence admitted during the trial of this case showing, or tending to show prior conviction of the defendants, or either of them, such evidence, if any, may be considered by you solely and only in so far as it may or may not affect the credibility of such defendant and the weight and value to be attached to his testimony, and for no other purpose whatsoever. The fact, if you find it to be a fact from the evidence in this case, that the defendants, or either of them, were previously convicted of any crime, or crimes, is not evidence of the commission by such defendant of the crime with which he stands charged in this case and is now being tried, and must not be considered as such by you.

Instruction No. 11

The jury are the sole judges of the facts in the case and also of the credibility of the witnesses, and of the weight

and value to be given to their testimony. In determining as to the credit you shall give to a witness, and the weight and value you should attach to his or her testimony, you may take into consideration the conduct and appearance of the witness on the stand; the interest of the witness, if any, in the result of the trial; the motive actuating the witness in testifying; the witness' relation to or feeling for or against the plaintiff or defendant, as the case may be; the probability or improbability of the witness' statements; the opportunity the witness had to observe or be informed [fol. 61] as to the matters respecting which such witness gives testimony; and the inclination of the witness to speak truthfully or otherwise as to the matters within the knowledge of such witness. All these matters being taken into account with all the other facts and circumstances given in evidence, it is your province to give to the testimony of each witness such value and weight as you deem proper, if upon the consideration of all the evidence you conclude that any witness has willfully sworn falsely as to any material matter involved in the trial, you may reject or treat as untrue the whole or any part of such witness' testimony, except in so far as it may be corroborated by other credible testimony in the case.

Instruction No. 12

These instructions are given by the court as a whole, and are so to be considered by you. Each and every instruction is to be considered by you in connection with all the other instructions.

Your verdict must be based upon the evidence, in arriving at it you should not discuss or consider anything in connection with this case, except the evidence received upon the trial. You are the exclusive judges of the evidence, but it is your duty to accept the law from the court as given to you in these instructions.

If I have said anything during the course of the trial, or if in ruling on motions or objections, I have made any statement, which appears to you to be a comment or opinion on the facts, or on the weight or convincing effect of the testimony of any witness, or as to the guilt or innocence of the defendant, it is your duty to disregard it. Likewise the statements of the attorneys in the case, made during the trial and in their arguments, are not evidence and should

be disregarded by you unless they accord with what your own recollection of the evidence is.

[fol. 62] Instruction No. 13

This being a criminal case it will require your entire number of 12 jurors to return a verdict.

In retiring to deliberate upon your verdict you will select one of your number as foreman, whose duty it will be to sign and date the verdict when you have agreed upon one, and to speak for the jury when called upon by the court to do so.

You will take with you to the jury room the exhibits in this case, which have been admitted in evidence, and these instructions.

There will be submitted for your convenience two forms of verdict; One, a verdict of guilty as charged in the information, with blank spaces left thereon for you to fill in the name, or names, of the defendant or defendants who you find guilty, if any; the other will be a verdict of not guilty with blank spaces left thereon on which you will fill in the name or names of such defendant or defendants that you find not guilty.

You will now listen to the argument of counsel.

(Sgd.) Chas. H. Leavy, Judge.

[fol. 63] [File endorsement omitted.]

In Superior Court of Spokane County

No. 11046

[Title omitted]

Verdict—Filed September 14, 1935

We, the jury in the above entitled action find the defendant E. R. Lindsey and Elbert B. Lindsey guilty, as charged in the information. Recommendation for leniency.

Dated at Spokane, Washington, this 14th day of September, 1935.

Geo. Earl Jordan, Foreman.

[fol. 64] IN SUPERIOR COURT OF SPOKANE COUNTY

No. 11046

STATE OF WASHINGTON, Plaintiff,

vs.

E. R. LINDSEY, Defendant

JUDGMENT, SENTENCE AND COMMITMENT UPON VERDICT OF GUILTY.—Filed November 1, 1935.

On this 1st day of November 1935, the above named defendant came into open court for pronouncement of judgment and sentence, and being asked by the Court if he had any legal cause to show why judgment of the Court should not be pronounced in his case, he makes his statement, the defendant being represented by Ralph E. Carlson, his counsel.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Grand Larceny, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed that said defendant, E. R. Lindsey, be punished by confinement in the Washington State Reformatory for a term of not more than 15 years, and shall pay the costs of this prosecution taxed at $26.50.

That said defendant shall stand committed to said institution until this sentence is complied with.

It is the further order of the Court that——.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 1st day of November, 1935.

Chas. H. Leavy, Judge.

Certificate

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington for Spokane County, do hereby certify the foregoing

to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open Court while the defendant was personally present.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of November, 1935.

Frank C. Nash, Clerk, by Nels Paulsen, Deputy.
(Seal.)

[File endorsement omitted.]

Penitentiary Verdict of Guilty.

Filed in Clerks Office Supreme Court, State of Washington, Jan. 2, 1936, Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.

[fol. 64½] In Superior Court of Spokane County

No. 11046

State of Washington, Plaintiff,

vs.

Elbert B. Lindsey, Defendant

Judgment, Sentence and Commitment Upon Verdict of Guilty.—Filed November 1, 1935.

On this 1st day of November 1935, the above named defendant came into open court for pronouncement of judgment and sentence, and being asked by the Court if he had any legal cause to show why judgment of the Court should not be pronounced in his case, he makes his statement, the defendant being represented by—— —— in person.

Thereupon, it is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Grand Larceny, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered, Ordered Adjudged and Decreed, that said defendant Elbert B. Lindsey be punished by confinement in the Washington State Reformatory for a term of not more than 15 years, and shall pay the costs of this prosecution taxed at $26.45.

That said defendant shall stand committed to said institution until this sentence is complied with.

It is the further order of the Court that——.

The said defendant is hereby remanded to the custody of the Sheriff of said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in, said institution.

Done in open Court, in the presence of the said defendant, this 1st day of November, 1935.

Chas. H. Leavy, Judge.

Certificate

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington for Spokane County, do hereby certify the foregoing to be a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open court while the defendant was personally present.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 1st day of November, 1935.

Frank C. Nash, Clerk, by Nels Paulsen, Deputy.
(Seal.)

[File endorsement omitted.]

Reformatory Verdict of Guilty.

Filed in Clerks Office Supreme Court State of Washington, Jan. 2, 1936, Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.

[fol. 65] [File endorsement omitted.]

IN SUPREME COURT OF WASHINGTON

EXTRACTS FROM CERTAIN ASSIGNMENTS OF ERRORS THAT APPELLANTS MADE TO THE SUPREME COURT OF WASHINGTON ON APPEAL,—Filed January 2, 1936.

The Notations (Tr—) found in these extracts do not refer to pages of this record, and should be disregarded.

Page 18—Assignment of Error No. 2

The court erred in not sustaining the motion of E. R. Lindsey made at the close of all the evidence (St Vol 1 43) as follows:

"Comes now the defendant E. R. Lindsey, at the close of all the evidence and renews his motion to dismiss as to him, or in the alternative that the court direct the jury to return a verdict of not guilty on the following grounds:

(1) That there is a fatal variance between the charge in the information and the proof adduced at the trial.

(2) That the evidence fails to show any act on the part of this defendant towards the commission of the crime charged.

(3) That the evidence fails to show any intent to defraud, and there is not even any evidence on which an inference of intent could be based.

(4) That neither the law nor the evidence would justify the jury in returning a verdict of guilty against this defendant.

(5) That any verdict so returned would be contrary to the evidence and not supported by any evidence.

(6) That all the evidence in this case would not warrant a verdict of guilty against this defendant."

Page 22.

As I have already shown this defendant, E. R. Lindsey, as well as Elbert B. Lindsey, was charged, jointly, with Grand Larceny in obtaining $40 from Peter M. Jacoy by color and aid of check No. 2, etc.

And E. R. Lindsey was tried for an altogether different alleged offense, to-wit: under R. R. S. Sec. 2601-2, by the following subterfuge:

At the close of the evidence the Prosecuting Attorney submitted to the court a requested instruction, under [fol. 66] R. R. S. Sec. 2601-2 (Tr 26-27), which instruction the court submitted to the jury (Tr 35) in words and figures as follows:

"Any person who shall with intent to defraud, make, or draw, or utter, or deliver to another person any check, or

draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full upon its presentation, shall be guilty of larceny. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of

Page 22 such check or draft, and the uttering or delivery of such a check or draft to another person, without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud."

Instruction No. 5

"You are instructed that before you can convict the defendant E. R. Lindsey, you must find from the evidence beyond a reasonable doubt:

(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, he made the check described in the information herein and delivered it to his son, Elbert B. Lindsey, co-defendant herein.

(2) That the making and delivery of said check, if any, by said E. R. Lindsey was with an intent to defraud some person or persons.

(3) That at the time of making and delivery, if any, said E. R. Lindsey knew that he did not have either funds or credit with the Spokane and Eastern Trust Company, the bank upon which it was drawn, to meet said check upon its presentation.

If you find each of the foregoing elements in this case to have been established by the evidence beyond a reasonable doubt, then you would find the defendant E. R. Lindsey guilty as charged in the information. If, on the other hand, the state has failed to prove each of the foregoing elements to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant E. R. Lindsey."

Instruction No. 6 (Tr. 37)

"You will note from the instructions heretofore given you herein that the specific charge upon which the defendant E. R. Lindsey is being tried, is that of issuing the check in question, with an intent to defraud, knowing at the time

of the issuance of said check that he had neither sufficient funds, nor credit with the bank upon which it was drawn."

These instructions were a plain departure from the allegations of the information. The information being under R. R. S. 2601 and the instructions as to E. R. Lindsey being under R. R. S. 2601-2.

Page 24

The court charged the jury as to Elbert B. Lindsey as follows:

[fol. 67] Instruction No. 5 (Tr. 36)

"You are instructed that as to the defendant, Elbert B. Lindsey before you can find him guilty of the charge contained in the information herein, you must find from the evidence beyond a reasonable doubt:

(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, said Elbert B. Lindsey, by color and aid of the check here in question—etc."

Page 25

(2) That at the time said Elbert B. Lindsey presented *said* check, etc."

(3) That said defendant, Elbert B. Lindsey, in procuring payment on said *check*, etc. (Italics mine.)

Instruction No. 6 (Tr. 37)

"As to the defendant Elbert B. Lindsey, the specific charge contained in the information against him is that with an intent to deprive and defraud the owner thereof, he obtained from Peter M. Jacoy the sum of Forty Dollars by color and aid of *the check in question herein*, etc.

Knowing at the time he so obtained the money that E. R. Lindsey the maker of *said* check, neither had funds in the bank upon which it was drawn, nor had credit arrangements with said bank to meet *it* when it would be presented."

E. R. Lindsey was further charged in the instructions, under an entirely different statute, and a different state of facts, one which is a separate and distinct crime, and to which a penalty of "petit larceny" only was attached and not "grand larceny."

Thus trying two defendants, in one trial, under one in-

formation, for two distinct, unrelated crimes, under different statutes, with different penalties, each offense requiring distinct evidence, and neither defendant taking part in the other's offense, and each offense requiring different instructions to the jury, on a distinct state of facts. This cannot be done under our laws and constitution, and neither E. R. Lindsey, nor Elbert B. Lindsey can lawfully be convicted under such a condition. There was no jurisdiction as to either.

Page 26

As to the charge under 2601-2 there was no information [fol. 68] and no jurisdiction.

Page 27

There was no information charging E. R. Lindsay with committing a crime under R. R. S. 2601-2.

Assignment of Error No. 3. Page 28 of Brief

The court erred in not granting the motion of Elbert B. Lindsey, for dismissal at the close of all the evidence. (St. Vol. 1-43.) This motion was the same as that made by E. R. Lindsey, set out in the preceding assignment of error, and was denied and exception taken. (St. Vol. 1-43.)

The same argument applies to this assignment as does to the assignment relating to E. R. Lindsey, excepting that Elbert B. Lindsey was not charged in the instructions under 2601-2.

Assignment of Error No. 6. Page 37 of Brief

The court erred in submitting the case to the jury under instructions, against two defendants, not on a joint charge, but on a charge under R. R. S. 2601 against Elbert B. Lindsey, and on a charge under R. R. S. 2601-2 against E. R. Lindsey.

The court in its instructions to the jury (Tr. 34) charged:

"You will note that in this case there are two defendants charged jointly," etc.

Then the court follows that instruction by instruction No. 4 (Tr. 35):

"You are instructed that the laws of the State of Washington, (Remington's Compiled Statutes 2601-2 provide as follows:

"Any person who shall with intent to defraud make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full, upon its presentation, shall be guilty of larceny. The word "credit" [fol. 69] as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of such check or draft, and the uttering or delivery of such a check or draft to another person, without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud."

"You are further instructed that the laws of the State of Washington, Section 2601, sub-division 2 provide as follows:

"Every person who, with intent to deprive or defraud the owner thereof—shall obtain from the owner • • • the possession of • • • personal property by color and aid of any order for the payment or delivery of property or money or any check, knowing the maker or drawer of such check was not authorized or entitled to make or draw the same, steals such property and shall be guilty of larceny."

Then the court follows with instruction No. 6 (Tr. 37):

"You will note from the instructions heretofore given you herein that the specific charge upon which the defendant E. R. Lindsey is being tried, is that of issuing the check in question, with an intent to defraud, knowing at the time of the issuance of said check that he had neither sufficient funds, nor credit with the bank upon which it was drawn.

"As to the defendant Elbert B. Lindsey, the specific charge contained in the information against him is that with an intent to defraud and deprive the owner thereof, he obtained from Peter M. Jacoy the sum of Forty dollars by color and aid of the check in question herein, knowing at the time he so obtained the money that E. R.
Page 38. Lindsey, the maker of said check, neither had funds in the bank upon which it was drawn, nor had credit arrangements with said bank, sufficient to meet it when it was presented."

It will be noted that he says "the specific charge upon

which E. R. Lindsey is being tried"—. He does not say E. R. Lindsey was ever charged with such an offense.

And as to Elbert B. Lindsey, he says "the specific charge contained in the information • • •".

Then the court goes on in instruction No. 6 (Tr. 37) and says:

"If the State has established these charges as to each of the defendants herein by the evidence in the case beyond a reasonable doubt, then you should convict the said defendants."

In other words, the court charged the jury that if they found E. R. Lindsey guilty under R. R. S. Sec. 2601-2, and found Elbert B. Lindsey guilty under R. R. S. Sec. 2601, [fol. 70] then the jury should convict them jointly of some crime—he does not charge which one, whether under 2601 or 2601-2.

Then the court goes on in instruction No. 8 (Tr. 38) and says:

"You are further instructed that the intent of one defendant when two defendants are being tried together, • • •"

And in instruction No. 9 (Tr. 38):

"If you find from the evidence in this case beyond a reasonable doubt that the defendants did commit the crime as charged in the information, • • •"

This trial and the procedure had thereunder and the instructions quoted above violate the IV, V, VI and XIV Amendments to the Constitution of the United States.

Page 39

The motions in arrest of judgment (Tr. 43-45) of both defendants, in right, must be sustained; in any event the case should in some form be ordered dismissed.

[fol. 71] Assignment of Error No. 13. Brief Page 46

The court erred in not granting Elbert B. Lindsey a separate trial.

A motion was made therefor (Tr. 17) and denied (Tr. 23).

That charge was changed in the substitute information (Tr. 4) and in the 2nd substitute information (Tr. 14),

both of which charged Elbert B. Lindsey and E. R. Lindsey, jointly, directly as principals, and with the same acts, viz: with obtaining the money on the check from Peter M. Jacoy.

This condition existed down through all the proceedings thereafter, until the time to instruct the jury was at hand. At the time of preparing instructions the prosecuting attorney representing the state presented requested instructions (Tr. 26-27), one instructing under R. R. S. 2601, and another under R. R. S. 2601-2—being two entirely different offenses, not related to each other, in which the defendants were not charged jointly, and the one under R. R. S. 2601-2 not being charged in the information.

Page 47

And the court adopting such requested instructions, charged the jury (Tr. 35-36) to find E. R. Lindsey guilty, if at all, under one law and its related facts, and to find Elbert B. Lindsey guilty under a different law and its related facts.

The charge as to E. R. Lindsey under 2601-2 R. R. S. being given in the face of the positive law of this state, Pierce Code 9148:

"No person shall be held to answer in any court, for an alleged crime or offense, unless upon an information filed by the prosecuting attorney, or upon an indictment by a grand jury, except in cases of a misdemeanor before a Justice of the Peace or before a court martial." and

Pierce Code Sec. 9272: "The indictment or information must contain but one crime, and in one form only, except that where the crime may be committed by use of different [fol. 72] means, the indictment or information may allege the means in the alternative."

Where a charge, such as the case at bar—contains a charge of two separate crimes, against two separate persons, and not on a joint state of facts, it violates all the principles of "due process" both under the constitution of the United States and of this state, and all positive law.

Page 48

Then the court, in order to add to his theory of "conviction at any price or means", charged the jury (Tr. 41):

"There will be prepared for your convenience two forms

of verdict: One a verdict of guilty as charged in the information, with blank spaces left for you to fill in the name or names, of the defendant or defendants who you find guilty, if any; the other will be • • • a verdict of not guilty with blank spaces left, etc."

It will be noted that the court did not furnish the jury with verdicts in accordance with his instructions, i. e.

A verdict of guilty as to E. R. Lindsey of the crime laid down in Sec. 2601-2, and

A verdict of guilty as to Elbert B. Lindsey of the crime laid down in Sec. 2601, or as charged.

No, the court came out straight from the shoulder and says to the jury:

"If you find the defendants guilty of anything—taking into account all the evidence as to both crimes in relation to which I have charged you—just write their names in this blank I have furnished you, which will make them guilty of grand larceny."

This was in plain violation of the rights of the defendants under the constitution of the United States and of this State, as to "due process of law."

It is apparent that the whole intention of the prosecutor was from the beginning to try two defendants on two sepa- [fol. 73] rate charges, in the same information, and to spring this situation on them at the time of giving the instructions. It cannot be done under any law. This proceeding must fall.

[fol. 74] Assignment of Error No. 15. Page 51 of Brief

The court erred in admitting in evidence over objection State's exhibits Nos. 3 and 5, being a commitment of each of the defendants on another charge. (St. 25 and 38.)

Page 53

Here we have commitments and sentences under a new statute, and I do not think there can be any question but what the commitments and sentences are ex post facto as to these defendants and thus utterly void, under the United States Constitution, but they do not even show the sentence.

Under the present law all the trial court can do is to write in the commitment the maximum sentence provided by law

for the alleged crime, and then within six months
pp. 54 after the convicted person is received at the place of confinement, the board of prison, terms and paroles, as it is called, fixes the sentence.

And as stated supra it would seem to be beyond question that these sentences and commitments that were introduced are void, and whether there can be another judgment and sentence pronounced, if the verdict is upheld—which does not seem possible under the record and facts, that another sentence would have to be pronounced, and thus the court in this case is, we contend, in the position of allowing something, of the most prejudicial kind, to be used as evidence, which does not, as a matter of fact exist.

[fol. 75] Assignment of Error No. 19. Brief page 64

The court erred in not granting the motion of E. R. Lindsey in arrest of judgment. (Motion tr. 45.) (Denied, journal entry Tr. 59.)

No conviction could legally be had of E. R. Lindsey, under R. R. S. 2601-2, as set out (Statute) in the court's instructions, (Tr. 35) (quoting Sec. 2601-2) and as set out in instruction No. 6.

As to this charge, being a different charge under R. R. S. 2601-2, there was never any information filed against E. R. Lindsey, charging such an offense; no such information was sworn to; he never had a chance to plead to such an information; was never informed of the nature of any such charge against him, and such charge never existed.

Page 65

To submit to a trial jury such instructions as hereinbefore set out and direct them to find a verdict of guilty if they find those elements established by the facts, when there has been no information filed, and none of the legal formalities complied with, violates the provisions of the Constitution of the United States in the following particulars:"

Violates Article XIV (14th amendment) wherein it is stated:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

So that it seems too plain for argument that E. R. Lindsey could not be tried in this case under R. R. S. Sec. 2601-2, as set out in the charge, and under the purported necessary elements of that offense as also set out in the charge.

The motion in arrest of judgment must be sustained as to any such charge in this case.

[fol. 76] Now as to the charge under R. R. S. 2601, the charge alleged in the information. (Tr. 14.)

The motion in arrest of judgment must be sustained as to that charge for the following reasons:

(1) The prosecuting attorney by submitting his requested instructions (Tr. 26-27) and which the court adopted as set out supra, thereby abandoned any attempt to convict E. R. Lindsey under R. R. S. Sec. 2601. The court specifically charged that unless the jury found the necessary elements to exist under Sec. 2601-2, that they should acquit E. R. Lindsey: (Tr. 36.)

"If on the other hand, the state has failed to prove each of the foregoing elements (those set out supra) to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant E. R. Lindsey."

There was no evidence on which to convict the defendant under Sec. 2601; Peter M. Jacoy testified (St. Vol. 1-2) that E. R. Lindsey had nothing to do with cashing the check and obtaining the money from him; there was not a suspicion of evidence in the case to show any intent to defraud by E. R. Lindsey, nor from which an intent to defraud could be deduced, and this is a necessary element under Sec. 2601. This was recognized by the court, and also by the prosecuting attorney by the method they pursued, and that charge was abandoned as to E. R. Lindsey, and he was in effect acquitted of that charge.

[fol. 77] Assignment of Error No. 20. Brief Page 68

The court erred in not sustaining the motion in arrest of judgment of Elbert B. Lindsey (Motion Tr. 43) (denied tr. 59).

Furthermore, under the information (Tr. 14) taken in connection with the instructions of the court, all the sections of the Constitution of the United States set out in the pre-

vious assignment of error in regard to E. R. Lindsey, were violated • • •.

[fol. 78] Assignment of Error No. 27. Brief Page 76

The law under which defendants were tried, convicted and sentenced was, and is, as to them void, being an ex post facto law being in direct violation of Section 10 of Article 1, of the Constitution of the United States: "No state shall • • • pass any • • • ex post facto law.

Page 77

The offense in this case is alleged to have been committed on or about April 15, 1935. (Tr. 14.)

The law under which the trial and sentence was had went into effect at midnight June 12, 1935 (See Statute) Chap. 114, Laws of 1935 of Washington.

Now in what particulars, if any, did this law Chap. 114, change the situation of defendants to their disadvantage?

The charge (Tr. 14) is grand larceny.

The punishment on April 15, 1935, was:

Under R. R. S. 2605 "imprisonment in the State Penitentiary for not more than fifteen years."

Also R. R. S. Sec. 2281 provided at that time:

"Where no minimum term of imprisonment is prescribed by law the court shall fix the same in its discretion at not less than six months nor more than five years."

Thus there was a sliding scale for both the minimum and maximum sentences, viz:

Minimum: From six months to five years.

Maximum: From six months to fifteen years.

Chap. 114, Laws of 1935 of Washington, changed this sentence as follows:

[fol. 79] Repeals R. R. S. 2281, and deprives the court of the power to fix and minimum, or any discretion in fixing the maximum.

Makes the maximum a flat 15 years as follows:

Page 78

In this case the maximum provided by law is 15 years. Chap. 114, Laws of 1935, thus deprives the defendants of any right to have the maximum fixed at less than 15 years,

which the court in its discretion had a right to do before, i. e., on April 15, 1935.

In other words, under Chap. 114, the sentence is always the maximum provided by law, and the convicted person is always subject to it under the discretion of the board, while under the law as it existed on April 15, 1935, the maximum term might, in the discretion of the court be fixed at a shorter term.

Page 80

A person convicted of an offense committed before Chap. 114 went into effect, but who was not convicted and sentenced until afterwards, cannot be subjected to any such imprisonment—it is void as to them—but the Act, Chap. 114, applies to all who may enter the institution after the Act went into effect.

There are no exceptions. The act is void as to these defendants and there is now no law under which they may be sentenced.

[fol. 80] IN SUPREME COURT OF WASHINGTON

NOTICE OF DECISION OF AFFIRMANCE—Filed August 20, 1936

Mr. Ralph E. Foley, Mr. C. C. Quackenbush, Mr. E. R. Lindsey, Spokane, Washington.

DEAR SIRS:

#26004—Re State of Washington vs. Lindsey and Lindsey

Opinion in the above entitled case filed this date.

"We find no prejudicial error in the trial of the case and the judgment is affirmed."

Yours very truly, Benj. T. Hart, Clerk, by Archie B. Stewart, Deputy.

[File endorsement omitted.]

[fol. 81] Copy Rec'd Oct. 3, 1936, Prosecuting Attorney, Spokane County, Wash.

[File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

MOTION IN ARREST OF JUDGMENT ON THE GROUND THAT THE DEFENDANTS WERE DENIED THE RIGHT TO TESTIFY IN THEIR OWN BEHALF AND TO CALL WITNESSES, IN CONTRAVENTION OF THE CONST. OF THE U. S., AND THAT A CONVICTION UNDER THE CIRCUMSTANCES IS A SHAME AND A REPROACH TO THE LAW—Filed October 7, 1936

I

The affirmance by this court on Aug. 20, 1936, Vol. 87, Wash. Dec. 298, and thereby directing that the defendants, and each of them be deprived of their liberty by the State of Washington, for a term of 15 years, is a direct denial of the rights of the defendants, as guaranteed to them by the VI and XIV amendments to the Constitution of the United States, and as guaranteed by Art. 1, Sec. 22 of the Constitution of the State of Washington.

And further such decision, in the words of this Supreme Court of Washington, as announced in State v. Harrass, 22 Wash. at p. 57, "It would be a shame and a reproach to the law to hold the defendants accountable for the laws mistakes."

In that, the defendants, and each of them were in all substantial effect, and in contemplation of the laws and Constitutions mentioned:

1. Each defendant denied the right to testify in his own behalf.

2. Each defendant denied the right to call witnesses in his own behalf.

3. Each defendant was denied a fair and impartial trial.

[fol. 82] II

That the defendants and each of them are denied the rights guaranteed to them by the XIV Amendment to the

Constitution of the United States, by this Supreme Court failing, neglecting and refusing to pass upon the question fairly presented to them in this case as to the rights of the defendants under the laws and constitutions, when as in this case, although as the court announced in its decision that the impeachment and annulment of the testimony of the defendants, and their witnesses by the introduction of the records of a previous conviction of a felony was without error by the trial court, of the effect on the rights of the defendants, when, before final decision in this court, and while the jurisdiction is solely in this court, this court renders a decision that the same previous convictions used for impeachment and annulment of testimony, were illegal, and obtained by misconduct of the Prosecuting Attorney (the same one who tried this case) and by the refusal of the trial Court, Hon. E. V. Kuykendall, to correct the situation, when duly called to his attention, and this court reversed and set aside said previous convictions.

III

That the specific question involved is:

That on May 3, 1935, the Deputy Prosecuting Attorney of Spokane County, Washington, filed two criminal informations against the defendants, jointly; that one of the cases was brought to trial on June 12, 1935, the said Deputy Prosecutor, one C. C. Quackenbush, representing the State of Washington; the cases being prosecuted in the name of the [fol. 83] State of Washington. Hon. E. V. Kuykendall, Judge of the Superior Court of the State of Washington, presiding as trial judge; that in order to obtain a conviction the said Quackenbush (among other things) put before the trial jury in his argument false and libelous statements of and concerning the defendants, and each of them, and in regard to matters not in evidence; that the defendants strenuously opposed this by proper objections, but that the trial Judge, E. V. Kuykendall, failed, neglected and refused to take any action to protect the rights of these defendants, as was held by this court in State v. Lindsey, 185 Wash. 206, where the statements of the prosecutor and the conduct of the trial judge are fully set out.

That the defendants at once appealed to this court, and took all proper steps so to do, and complained to this court of the said actions of the State officers in condemning them,

and each of them wrongfully to imprisonment, and this court on Jan. 10, 1936, sustained and upheld the contention of defendants, and in said case of State v. Lindsey, 185 Wash. 206 held said convictions to have been illegally obtained, by the said acts of said State officers, and this court annulled and set aside said convictions, and they have ever since been and remained so annulled and set aside, as being illegal under the law.

That the illegality of said convictions was not occasioned by any act or omission on the part of the defendants, or either of them, but was solely a wrongful act of the State of Washington.

That the said C. C. Quackenbush, Deputy Prosecutor, for [fol. 84] and on behalf of the State of Washington, brought the case at bar—one of the cases started on May 3, 1935—on for trial on Sept. 12, 1935, and before defendants could have the illegality of the said convictions tested in this court, although defendants used their utmost diligence in the matter; that in the trial of said cause it was necessary and proper that the defendants testify, on their own behalf and as witness for each other; that they did so offer themselves as witnesses; that at the time of so doing the said C. C. Quackenbush impeached and annulled the effect of their testimony, and of each of them, by presenting in evidence and reading to the jury the convictions, judgments and sentences so obtained in the previous case, and which was then on appeal. That this was allowed by the trial court, and held to be proper in the decision of this court, State v. Lindsey, Vol. 87, Wash. Dec. 298.

And then the question in issue is presented; What is now the effect on the rights of the defendants, their conviction having been obtained by the use of impeaching testimony, and in effect depriving them of their right to testify and to call witnesses, when the impeaching testimony is now shown to have been illegal, and the illegality was occasioned by the acts of the State and not by the acts of the defendants?

This question this court has ignored in its decision, supra, and failed, neglected and refused to pass on; yet condemning the defendants to a long deprivation of their liberty, solely through the illegal acts of the State's Officers, sometimes called a mistake of law.

This question has been fairly presented to this court. This court is the only court that had has jurisdiction of

[fol. 85] this case since January 1, 1936, and the only one that has had or could have jurisdiction of the case since the former convictions were declared illegal.

Defendants have presented to this court, by way of a Supplemental Transcript, a certified copy of the decision and remittitur in the former case, annulling and holding illegal the said former convictions.

Defendants have also presented a motion to this court to be allowed to place in evidence, before this court, a certified copy of said decision.

This court also has before it its own opinion holding the said convictions to be illegal, as found in State v. Lindsey, 185 Wash. 206.

And one Department of this court—five of the same members who now sit en banc, were the members of this court that considered said case at the time the convictions were held to be illegal.

This question was raised in our briefs at all times after the convictions were set aside, and especially in the brief filed at the time of the hearing en banc, on June 29, 1936, wherein on page 14 we said:

"And it seems to us that one of the grave questions in this case is the question of the effect of the evidence and exhibits introduced by the State over objection, as to the previous convictions of the defendants (for whatever purpose introduced) and the fact that the case in which those convictions were obtained has now, since the trial of this case in the lower court, and those verdicts, judgments and sentences, has been annulled, cancelled and set aside, so that in reality they never existed either in fact or in law."

And on page 19, same brief:

"The situation is the same as though they had been [fol. 86] forged by the prosecutor; they were procured by his own wrong doing in the previous case, and when that fact is shown, as it has been, there can be no question but that the defendants were denied a fair and impartial trial thereby.

Under no theory of law or practice or procedure, sanctioned by this court, or by any other court of the land, can this conviction be maintained, with these exhibits before the jury.

While it is true that the statutes of this state and the

decisions of this court permit former convictions (when they actually exist) of a witness to be shown to affect his credibility, and so also when the defendant takes the stand he is a witness, still the prejudice as to the defendant is far greater if his own conviction is shown than if it is applied to some other witness, for in the case of a witness, it cannot be taken into account as a part of the evidence prejudicing the jury against the defendant. But it would seem useless to continue the argument along these lines, *for these former convictions never really existed.*"

This same matter was also presented to this court in our reply brief, pp. 1, 2 and 3; in a supplemental brief pp. 6, 7, and 8, and in the brief on hearing en banc pp. 14 to 19.

It was fully presented, and absolutely ignored by this court, the only court having jurisdiction in the matter, to apply the corrective for the wrong that has been occasioned by the mistakes of the law.

This court having affirmed the judgment, and this situation still existing, it is the plain duty of this court to grant the motion and arrest the judgment as to each of the defendants.

This motion is based on the files and records in this case and on the affidavit of E. R. Lindsey, hereto attached.

E. R. Lindsey, for Appellants, 1104 1-2 W. 2nd Avenue, Spokane, Wash.

[fol. 87] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF E. R. LINDSEY IN SUPPORT OF MOTION IN ARREST OF JUDGMENT—Filed October 7, 1936

STATE OF WASHINGTON,
County of Spokane, ss:

E. R. Lindsey being first duly sworn on oath deposes and says: that he is one of the appellants above named, and makes this affidavit in support of the motion of defendants in arrest of judgment. That defendants are now, by the decision of this Supreme Court of August 20, 1936, affirming a judgment of the Superior Court of Spokane County, Wash., dated Nov. 1, 1935, condemned to be deprived of

their liberty, and ordered confined in the penal institutions of the State of Washington, by the said state, its officers and agents, acting under the authority of the said state, and in its name, for a term of 15 years each, by means and virtue of—

What is legally termed "a mistake of the law", now being enforced, perpetrated and carried out, knowingly, by one C. C. Quackenbush, Deputy Prosecuting Attorney of Spokane County, Washington, and upheld by the Supreme Court of the State of Washington, sitting en banc, by a judgment written by Hon. O. R. Holcomb, one of its judges, with the notation "All concur", which is taken to mean that the other eight judges, comprising the whole of said court agree to said opinion, with the full knowledge of all the [fol. 88] said judges that the defendants are so condemned to be deprived of their liberty by "a mistake of the law", for which defendants or either of them were in no way responsible, and that said judgment will be carried out and defendants so deprived of their liberty, if said judgment is left in force and effect.

That said "mistake of law" was not occasioned by any act or omission on the part of the defendants, or either of them, but was solely caused and occasioned by the acts of the State of Washington, its officers and agents.

That said "mistake of law" is one which has not been provided for or a remedy provided by any act of the law-making power of the State of Washington.

That defendants are now and at all times have been entitled to the presumption of innocence, until they have been accorded a fair trial, and their guilt demonstrated by the State by legal evidence, upon a fair trial, where no constitutional or legal right is denied them.

That if the laws of the State of Washington do not provide a plain, adequate procedure by which a defendant may be convicted, without the State taking advantage of a "mistake of law" of a denial of defendants' constitutional rights, then the presumption of innocence prevails and defendants are entitled to their liberty.

That further, the "mistake of law" was caused, occasioned and brought about by acts of the State and its officers, that demonstrate that it has been done as a deliberate fraud, first occasioned by fraudulent, wrongful and illegal acts of the said C. C. Quackenbush, Deputy Prosecuting

[fol. 89] Attorney, acquiesced in by Hon. E. V. Kuykendall, a Judge of the Superior Court in the first instance, in that the said C. C. Quackenbush, falsely and libelously stated to the trial jury of and concerning E. R. Lindsey,

"But so far as E. R. Lindsey is concerned he is so hardened in crime that there is no hope that he will ever reform"

and stating of and concerning Elbert B. Lindsey at the same time and place:

"If we want to send Elbert B. Lindsey to the penitentiary as his counsel has suggested, we have a much greater crime that we could have charged him with than this; one that he might have been charged with and much more easily convicted; this is just a small matter."

And then when the defendants made the proper application to the Judge, E. V. Kuykendall, to properly instruct the jury in regard to the above libelous matter, the said judge failed, neglected and refused to do so.

That such actions of said Quackenbush and the trial judge were wrongful and unlawful, and on account thereof this court reversed said convictions. Lindsey v. State, 185 Wash. 206.

That the information in the above case was filed by the said prosecutor on May 3, 1935, who at the same time filed the information in the case at bar; that the apparent motive of the said prosecutor in using such means to secure a conviction was for the purpose of using such conviction to impeach the defendants and their witnesses in the case at bar, just as he did subsequently so use the conviction, and to so use it before defendants could have it set aside.

That the said "mistake of law" is now being further carried out and by means thereof unlawfully depriving these appellants of their liberty, by this Supreme Court [fol. 90] acquiescing in said acts of the said prosecutor, by the decision of this court affirming the judgment at bar, with full knowledge that said convictions and sentences have heretofore been annulled and set aside.

That treating the situation as a simple "mistake of law" it occurred and was brought about as follows:

That on Sept. 12, 1935, defendants, jointly, were tried in the Superior Court of Spokane County, Washington, on the felony charge in the case at bar, being prosecuted by said C. C. Quackenbush (Tr of files 14). That defendant

Elbert B. Lindsey was called as a witness for the defense, both for himself and his co-defendant (St F 19). That E. R. Lindsey defendant was likewise called as a witness for himself and for his co-defendant. (St. F. 30).

That the said C. C. Quackenbush for the State put in evidence impeaching the testimony of Elbert B. Lindsey a certain judgment of conviction in a felony case of said Elbert B. Lindsey (Ex. No. 3, St. F. 25) and also likewise put in evidence impeaching the testimony of E. R. Lindsey, a certain judgment of conviction on a felony charge (Ex. No. 5, St. F. 38) (Being the same judgments heretofore referred to as being annulled by the Supreme Court, but using them before they could be annulled).

That said judgments and convictions and each of them were procured by said C. C. Quackenbush by his own misconduct, in Case No. 11045 of Spokane County, Wash., No. 25867 of this Supreme Court.

That on January 1, 1936, the record on appeal in this case at bar was lodged in this Supreme Court, and in [fol. 91] appellants opening brief filed at that time at pp. 54, appellant said:

"It would seem to be beyond question that these sentences and commitments that were introduced were void."

This brief had already been served on the said prosecutor, before it was filed.

That on January 10, 1936, this same Supreme Court handed down its opinion in case No. 11045-25867 reversing and setting aside said convictions and judgments that had been used as exhibits, Nos. 3 and 5 to impeach the testimony of the defendants and their witnesses, the reason for reversal being "misconduct of the said C. C. Quackenbush" prosecutor, which misconduct the trial judge, Hon. E. V. Kuykendall, failed and refused to correct, although the matter was strenuously called to his attention by defendants at the time it was committed.

That said judgments and convictions, never have been re-instated, or the said cause re-tried, and the said convictions still remain in all respects annulled.

That said decision setting aside said convictions is found in Vol. 185 Washington Reports at page 206—Pac.— That also a certified copy of same is now on file as a supplemental transcript in this record, and the defendants have moved to introduce a certified copy of same in evidence before this

court, the only court now having jurisdiction at the present time.

That said decision of reversal was rendered by a part of the judges who are now sitting en banc in this case.

That on January 27, 1936, 17 days after the setting aside of said convictions, and with full knowledge that they had [fol. 92] been so set aside, the said Quackenbush, prosecutor, served, filed and presented to this court "respondent's brief", being the brief of the State of Washington in this case, in which he urged, on behalf of the State:

"Respondent respectfully submits that the judgment of the trial court should be sustained."

That this was done with full knowledge by the State of Washington, its officers and agents, that said judgment, and said conviction of defendants, and the condemning them and each of them to be deprived of their liberty for 15 years, had been procured by the State by "a mistake of law", if, indeed, it can be said it was not actually a deliberate fraud, perpetrated by the State; which "mistake of law" was not occasioned by any act of omission of defendants, or either of them, but occasioned solely through the actions of the State and its officers.

That appellants at once prepared, served on the prosecutor and filed their "reply" brief in which on pages 1, 2 and 3 this matter was fully brought to the attention of the court and the prosecutor, respondents saying therein, among other things:

"Counsel's silence on the subject, and their failure to answer such contention, knowing that the case in which the exhibits were issued has been reversed, must be taken as an admission that such error exists.

If counsel had a proper regard for the rights of an accused person he would unhesitatingly confess error • • •.

When the convictions were obtained by misconduct of counsel, and he thus obtained a so-called judgment, sentence and commitment, which he thought he could, and did, use as evidence in this case, and putting the same before the jury showing a somewhat similar offense, and a sentence to a long term in the penitentiary—although he must have known that the result would be that the case would be reversed and the proceedings nullified thus himself making false evidence to his knowledge, and manufactured by himself.

But at any rate, whatever his motives • • • the situation now exists • • • that the prosecutor put before the jury, wrongfully, the impression that the defendants were [fol. 93] guilty of some other crime, and had been sentenced to a long term of imprisonment, when the same turned out to be untrue, and of all of which he had ample warning • • •."

Thereafter appellants prepared, served and filed a supplemental reply brief, wherein this question was again taken up on pages 1 and 2, where it was said in regard to the introduction of the previous convictions:

This was wrong for several reasons, in the first place, the State should not be allowed to gamble with the liberty of its citizens—that is not the public policy of the State • • •.

The said exhibits 3 and 5, the judgments, sentences and commitments, never existed, as a matter of law and when the situation was cleared they had disappeared completely. And above all the whole situation was brought about, by the very person who sought to use his ill-gotten gains, to the prejudice and injury of these defendants.

The case was set down in this Supreme Court before a department for hearing on March 18, 1936, and argued by the prosecutor, and on or about May 1, 1936, appellants were notified that the case would be heard en banc on June 3, 1936—it was then put over by request of the prosecutor until June 29, 1936, and before the hearing on June 29, 1936, appellants filed an additional brief, wherein on pages 14 to 19 this matter was again taken up, and there it was said:

And it seems to us that one of the grave questions in this case is the question of the effect of the evidence and the exhibits introduced by the state over objection, as to the previous convictions of the defendants, and the fact that the case in which those convictions were obtained has now, since the trial of this case in the lower court, been reversed by this court, and those verdicts, judgments and sentences have been annulled, cancelled and set aside, so that in reality they never existed either in fact or in law.

That the case was argued by the prosecutor on June 29, 1936, and this Supreme Court of Washington, on August 20, 1936, in an opinion found in Vol. 87, Wash. Dec. pp. 298,

without in any manner mentioning the question here involved, and ignoring the same, entered its opinion and [fol. 94] order directing that the judgment of the Superior Court of Spokane, Wash., of Nov. 1, 1935, be carried out, and defendants imprisoned thereunder for a period of not more than 15 years each.

That this Supreme Court in all respects ignored, failed, neglected and refused to mention in its opinion or to take into consideration in any manner or render any opinion on the question presented, that is, that by reason of the change in conditions since the reversal of Case No. 11045-25867, and the setting aside of the convictions of the defendants which had been used for impeachment, that defendants are now and have been condemned in a trial in which they were in all substantial respects denied the right to testify in their own behalf, and denied the right to call witnesses to testify for them, all by reason of "a mistake in law" or "a fraud practiced by the State of Washington, by its officers and agents", and which is still being so practiced.

That neither of the defendants have ever been convicted of any crime or misdemeanor, save and except the one at bar, obtained in the manner herein set out, and the conviction in No. 11045-25867 which was by this court set aside.

E. R. Lindsey.

Subscribed and sworn to before me this 1st day of October, A. D. 1936. Alex Allardyce, Notary Public, State of Washington, residing at Spokane, Washington. (Seal.)

[fol. 95] IN SUPREME COURT OF WASHINGTON

NOTICE OF ORDER DENYING MOTION IN ARREST OF JUDGMENT, ETC.—Filed October 23, 1936

Mr. Ralph E. Foley, Mr. C. C. Quackenbush, Mr. E. R. Lindsey, Spokane, Washington.

DEAR SIRS:

#26004—Re State of Washington vs. Lindsey and Lindsey

Motion for arrest of judgment and motion re verdict, both motions denied.

(Motion Docket #8—p. 55.)

Yours very truly, Benj. T. Hart, Clerk.

[File endorsement omitted.]

[fol. 96] IN SUPREME COURT OF WASHINGTON

No. 26004

STATE OF WASHINGTON, Respondent,

vs.

E. R. LINDSEY and ELBERT R. LINDSEY, Appellants

Spokane County No. 11046

JUDGMENT—November 2, 1936

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Spokane County, and upon the argument of counsel, and the Court having fully considered the same, and being fully advised in the premises, it is now, on this 2nd day of November, A. D. 1936, on motion of Ralph E. Foley, Esquire, of counsel for respondent considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is hereby affirmed with costs; and that the said State of Washington have and recover of and from the said E. R. Lindsey and Elbert R. Lindsey the costs of this action taxed and allowed at Seventy nine and 95/100 ($79.95) Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Recorded and of record in Journal 33, page 246, records of the Supreme Court of Washington.

[fol. 97] IN SUPREME COURT OF WASHINGTON

]Title omitted[

MOTION OF DEFENDANTS FOR PERMISSION FOR SUPERIOR COURT OF SPOKANE COUNTY, WASHINGTON, TO RE-OPEN THIS CAUSE AND PROCEED IN SUCH MANNER AS IT DEEMS PROPER —Filed November 9, 1936

Comes now the defendants (Petitioners) and move this court for an order permitting the Superior Court of Spokane County, Washington, the trial court, to re-open the case, and judgment heretofore rendered by this Supreme

Court, dated Nov. 2, 1936, and filed in the Superior Court of Spokane County, Washington, Nov. 4, 1936, and for permission to the said Superior Court to proceed in such manner as it may deem proper, on the ground of newly discovered evidence, or a newly created situation, material to defendants, and which evidence and situation was not in existence at the time of trial, or at the time of motion for new trial or at any time while the jurisdiction of this cause was in the said trial, Superior Court, and which could not with reasonable dilligence have been discovered or foreseen by defendants.

And by reason of and by which defendants and each of them were denied a fair trial as guaranteed by the XIV amendment to the Constitution of the United States, and in contravention of the said Constitution and in contravention of the Constitution of the State of Washington, and in all substantial effect wrongfully and illegally deprived defendants, and each of them of their right to testify in their own defense, they so offering themselves, and denied them the right to call witnesses, by reason of what is sometimes called a mistake in law, for which the defendants, or [fol. 98] either of them, were in no way responsible, and for which the State of Washington, alone was responsible, in that at the time of trial defendants took the witness stand and called each other as witnesses, and that the State of Washington offered in evidence and read to the jury, and put in evidence, a certified copy of a previous conviction of each of the defendants of a felony charge, exhibits 3 and 5, in cause No. 11045 of the said Superior Court, No. 25867 of this Supreme Court, for the purpose of impeaching the testimony of the defendants and each of them, and it did have such effect; that thereafter and to-wit, on January 10, 1936, and after the jurisdiction of this case was in this Supreme Court, this Supreme Court reversed and set aside said judgment of conviction in said cause No. 11045-25867.

That it is very material for defendants and their right under the Constitution of the United States and of this State to be afforded an opportunity of presenting the fact before some court that said judgments so used for impeachment were set aside; that under the practice of this State the Superior Court, the trial court is the only court that can hear such evidence; that the said Superior Court is

without jurisdiction to do so unless such permission is granted by this court; that the final judgment has now been entered by this court, and returned to the Superior Court, and that it is but natural and proper justice that defendants be afforded an opportunity to present the facts above set out to the Superior Court of Spokane County, Washington, and that this court grant permission for such to be done.

This motion is based on the files and records and on the affidavit of E. R. Lindsey hereto attached.

E. R. Lindsey, for Petitioners.

[fol. 99] IN SUPREME COURT OF WASHINGTON

[Title omitted]

AFFIDAVIT OF E. R. LINDSEY IN SUPPORT OF MOTION FOR PERMISSION TO SUPERIOR COURT TO RE-OPEN CASE—Filed November 9, 1936

STATE OF WASHINGTON,
County of Spokane, ss:

E. R. Lindsey being first duly sworn upon oath deposes and says: That he is one of the defendants above named; that on the trial of this cause on Sept. 12-13, 1935, in the Superior Court of Spokane County, Washington, the defendants and each of them took the stand as witnesses and called each other as witnesses; that the State of Washington, for the purposes of impeaching the defendants and each of them introduced in evidence exhibits 3 and 5, being judgments of conviction of defendants and each of them in a felony case; being case No. 11045 of the Superior Court of Spokane County, Wash., and No. 25867 of this Supreme Court; that on said date the said case No. 25867 was on appeal to this court, and on Jan. 10, 1936, the said cause No. 11045-25867 was by this court reversed and the judgments and convictions held to have been illegally obtained by the misconduct of the Prosecuting Attorney for the State.

That by such action of the State the defendants were illegally and wrongfully impeached in their testimony by the use of the illegal judgments of conviction, and the defendants were in all substantial effect deprived of their right

to testify for themselves and to call witness- for their defense, in violation of their rights under the XIV amendment to the Constitution of the United States.

That defendants have no other way of introducing in evidence the fact of the reversal of said judgment except by permission of this court for the Superior Court to reopen the case, set aside the judgments and grant a new trial.

That the defendants are fully entitled to this under the rights guaranteed to them by the said XIV Amendment to the U. S. Constitution. That the fact of reversal is material to defendants and could not be procured at the time of trial.

E. R. Lindsey.

Subscribed and sworn to before me this 5th day of November, 1936. Lee S. Wood, Notary Public, State of Wash. (Seal.)

[File endorsement omitted.]

Copy received Nov. 5, 1936, Prosecuting Attorney, Spokane County, Wash.

[fol. 100] In Supreme Court of Washington

[Title omitted]

Additional Affidavit in Support of Motion for Permission to Superior Court of Spokane County to Re-Open Case and Proceed in Such Manner as It May Deem Proper, on the Ground of New Evidence—Filed November 12, 1936

State of Washington,
County of Spokane, ss:

E. R. Lindsey being first duly sworn on oath deposes and says: That he is one of the defendants above named, and makes this further affidavit in support of the motion of defendants for leave for Superior Court to proceed further in the case, after judgment in the Supreme Court.

And affiant further states that on Sept. 12-13, 1935, at the time of the trial of this cause in the Superior Court of Spokane County, Washington, in the case in which the

judgment was rendered and conviction had against the defendants and each of them, the following proceedings were had:

"Elbert B. Lindsey, called as a witness by the defense, was sworn and testified:

Cross examination.

By Mr. Quackenbush:

State's exhibit No. 3 marked for identification.

Q. Have you ever been convicted?

Mr. Donovan: I object. There is pending in the Supreme Court an appeal from the matter he is inquiring about, and while the question of appeal is pending it is improper at this time to attempt to use a conviction in the Superior Court when the case is pending on appeal and the conviction will not be complete until the Supreme Court has passed upon the question involved.

The Court: Objection overruled.

Mr. Donovan: Exception.

Q. I hand you state's exhibit No. 3 for identification and ask you if you are the party referred to in that instrument?

A. Yes, I am.

Mr. Quackenbush: I offer state's exhibit No. 3 in evidence.

Mr. Donovan: Same objection.

[fol. 101] The Court: Objection over-ruled.

Mr. Donovan: Exception.

(State's exhibit No. 3, commitment of Elbert B. Lindsey received in evidence and marked.)

Mr. Quackenbush: Reads said exhibit in full to the jury.

(Said exhibit so read being in words and figures as follows:)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

Case No. 11045

STATE OF WASHINGTON, Plaintiff,

vs.

ELBERT B. LINDSEY, Defendant

Judgment, Sentence and Commitment upon Verdict of Guilty

Reformatory

On this 10*ty* day of July 1935, the above defendant came into open court for pronouncement of judgment and sentence, and being asked by the court if he had any legal cause to show why judgment of this court should not be pronounced in his case he made his statement, the defendant being represented by E. R. Lindsey and L. J. Birdseye, his counsel.

Thereupon, it is now by the court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of attempted grand larceny, as to Count I, as charged in said information, that the defendant now before the Court is guilty and it is now by the court considered, Ordered Adjudged and Decreed, that the said defendant Elbert B. Lindsey be punished by confinement at hard labor in the Washington State Reformatory, for a term of not more than 7½ years (Seven and one half years) and shall pay the costs of this prosecution taxed at $51.95. That said defendant shall stand committed to said institution until this sentence is complied with.

It is the further order of the court that——

That said defendant is hereby remanded to the custody of the Sheriff of • • • said County to be detained and delivered into the custody of the proper officers for transportation to, and confinement in said institution.

Done in open court in the presence of the said defendant this 10th day of July, 1935.

E. V. Kuykendall, Judge.

Filed Jul. 10, 1935, Frank C. Nash, Clerk.

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County, and ex-officio Clerk of the Superior Court of the State of Washington for Spokane County, do hereby certify that the foregoing is a full true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open court while the defendant was personally present.

In testimony whereof I have hereunto set my hand and affixed the seal of said court this 10th day of July, 1935.

Frank C. Nash, Clerk, Nels Poulsen, Deputy. (Seal.)

[fol. 102] That thereafter the following proceedings were had in the Supreme Court of the State of Washington.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON, JANUARY SESSION, A. D. 1936

Be it Remembered, That at a regular session of the Supreme Court of the State of Washington, begun and holden at Olympia on the 2nd Monday of January, A. D., 1936, it being the thirteenth day of said month, among other • • • the following was had and done, to-wit:

Tuesday, February 11, 1936.

No. 25867. Spokane County No. 11045

STATE OF WASHINGTON, Respondent,

vs.

E. R. LINDSEY and ELBERT B. LINDSEY, Appellants

Judgment

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Spokane County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 11th day of February, A. D., 1936, on motion of E. R. Lindsey, Esquire, of counsel for appellants, considered, adjudged and decreed, that the judgment of the said Superior Court be, and the

same is, hereby reversed and the cause remanded with directions to grant appellants a new trial and that the said E. R. Lindsey and Elbert B. Lindsey have and recover of and from the state of Washington the costs of this action taxed and allowed at Fifty-nine and 25-100 ($59.25), and that execution issue therefor. And it is further ordered that this cause be remitted to the Superior Court for further proceedings in accordance herewith.

I, Benj. J. Hart, Clerk of the Supreme Court of the State of Washington, do hereby certify that the foregoing is a true copy of the judgment and decree in said cause, as the same now remains of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Olympia, this 11th day of February, A. D. 1935.

Benj. J. Hart, Clerk of the Supreme Court, State of Washington. (Seal.)

Filed Feb. 13, 1936. Frank C. Nash, Clerk.

That further on said 12-13 days of Sept. 1935, in the said court and cause, as hereinbefore set out, viz: the Superior Court of the State of Washington for Spokane County, the following proceedings as to E. R. Lindsey were had:

[fol. 103] E. R. Lindsey, one of the defendants, called on behalf of the defense, was sworn, and testified:

Cross-examination.

By Mr. Quackenbush:

Q. I hand you a paper marked State's exhibit No. 5 for identification and ask you if you are the party referred to in that instrument?

A. I assume I am; that is my name.

Mr. Carlson: I object as incompetent, irrelevant and immaterial.

Overruled. Exception.

Mr. Quackenbush: I offer State's exhibit No. 5 in evidence.

Mr. Donovan: We object as incompetent, irrelevant and immaterial.

The Court: Objection overruled.

Exception.

(State's exhibit No. 5 admitted in evidence, being a commitment of E. R. Lindsey.)

Mr. Quackenbush read the exhibit to the jury.

(Said exhibit No. 5 being in words and figures as follows:)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR SPOKANE COUNTY

No. 11045

STATE OF WASHINGTON, Plaintiff,

vs.

E. R. LINDSEY, Defendant

Judgment, Sentence and Commitment Upon Verdict of Guilty

Penitentiary

On this 10th day of July, 1935, the above defendant came into open court for pronouncement of judgment and sentence, and being asked by the court if he had any legal cause to show why judgment of this court should not be pronounced in his case he made his statement, the defendant being represented by E. R. Lindsey and L. J. Birdseye, his counsel.

Thereupon, It is now by the Court considered and adjudged upon the verdict of the jury finding the defendant guilty of the crime of Attempted Grand Larceny, as to Count I, as charged in said information, that the defendant now before the Court is guilty and it is now by the Court considered Ordered Adjudged and Decreed, that the said defendant be punished by confinement at hard labor in the Washington State Penitentiary, for a period of not more than 7½ years (seven and one half years) and shall pay the costs of this prosecution taxed at $51.95. That said defendant shall stand committed to said institution until this sentence is complied with.

It is further order of the court ——.

That said defendant is h-reby remanded to the custody of the Sheriff of said County to be detained and delivered

into the custody of the proper officers for transportation to, and confinement in said institution.

Done in open court in the presence of the said defendant, this 10th day of July, 1935.

E. V. Kuykendall, Judge.

Filed Jul. 10, 1935. Frank C. Nash, Clerk.

STATE OF WASHINGTON,
County of Spokane, ss:

I, the undersigned, County Clerk of Spokane County and [fol. 104] ex-officio Clerk of the Superior Court of the State of Washington, for Spokane County, do hereby certify that the foregoing is a full, true and correct copy of the judgment, sentence and commitment, as the same appears on file and of record in my office, and I further certify that said judgment, sentence and commitment was pronounced, signed and entered in open court while the defendant was personally present.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said court this 10th day of July, 1935.

Frank C. Nash, Clerk, Nels Paulsen Deputy. (Seal.)

That said judgment, sentence and commitment were in all respects set aside and annulled and reversed by the judgment of the Supreme Court of the State of Washington in Case No. 25867, of date February 11, 1936, as set forth in haec verba, supra, in this affidavit.

That the judgments, sentences and commitments, exhibits 3 and 5 of the State had heretofore been procured by the acts of the State of Washington, plaintiff herein.

That they were introduced for the purpose of impeaching the defendants and each of them, and did so impeach the defendants.

That they were introduced and put before the jury by the State of Washington and by the Court on the theory of law that they were valid and subsisting judgments, which they purported to be on their face.

That this theory of law indulged in by the Court at the time of their admission was a mistaken theory, in other words, the introduction of said exhibits was "a mistake of law", for which the defendants or either of them were in no way responsible, but a Mistake of law for which the State of Washington, plaintiff, alone was responsible.

That the State of Washington being the "actor" in this

[fol. 105] proceedings, and this mistake of law being the mistake of the state alone, defendants are entitled under their constitutional guaranty contained in the XIV amendment to the constitution of the United States, and under the Constitutional guaranty-s of the Constitution of the State of Washington, to an opportunity to present this mistake of law to some judicial tribunal in the course of this proceeding.

That as the Supreme Court of the State is not a tribunal empowered to hear and receive evidence in this state, and as the Superior Court is such a tribunal, the defendants are entitled as a matter of right and fundamental justice to have the jurisdiction transferred back to the Superior Court, where they may be afforded an opportunity to present the evidence of the fact of the reversal of the judgments, sentences and commitments, in evidence, and be accorded a fair and impartial trial where no constitutional or legal rights are denied them. That up to this time, and without such leave to the Superior Court, defendants will continue to be so denied their constitutional rights.

E. R. Lindsey.

Subscribed and sworn to before me this 9th day of November, 1936. Alex Allardyce, Notary Public, State of Washington, residing at Spokane, Wash. (Seal.)

[File endorsement omitted.]

Copy received Nov. 9, 1936, Prosecuting Attorney, Spokane County, Wash.

[fol. 106] In Supreme Court of Washington

Notice of Order Denying Motion to Re-Open Case—Filed November 27, 1936

Mr. Ralph E. Foley, Mr. C. C. Quackenbush, Mr. E. R. Lindsey, Spokane, Washington.

Dear Sirs:

No. 26004—Re State of Washington vs. Lindsey and Lindsey

Motion to re-open case is denied.

(Motion Book #8—page 63.)

Yours very truly, Ben. T. Hart, Clerk.

[File endorsement omitted.]

[fol. 107] IN SUPREME COURT OF WASHINGTON
En Banc. No. 26004

THE STATE OF WASHINGTON, Respondent,

v.

ELBERT B. LINDSEY and E. R. LINDSEY, Appellants

OPINION—Filed August 20, 1936.

This appeal is from a judgment and sentence upon a verdict of conviction.

On September 4, 1935, an information was filed in the office of the clerk of the superior court of Spokane county, charging defendants with the crime of grand larceny, as follows:

"That the said defendants, Elbert B. Lindsey, and E. R. Lindsey, in the County of Spokane, State of Washington, on or about the 15th day of April, 1935, then and there being, did then and there wilfully, unlawfully, feloniously and fraudulently, by color and aid of a check in words and figures as follows, to-wit:

'Spokane, Wash. Apl 15 1935. No. 2.

Spokane and Eastern Trust Company

Pay to the order of Elbert B. Lindsey, $40.00
Forty 00/ Dollars
E. R. Lindsey'

and endorsed on the back thereof: 'Elbert B. Lindsey, 1104½ W. 2nd Ave Co Service National Guard'
obtain from Peter M. Jacoy Forty dollars ($40.00) in money and currency of the United States of America, of the value of Forty Dollars, and the property of the said Peter M. Jacoy, with intent to deprive and defraud the said Peter M. Jacoy, the owner thereof, the said defendants then and there knowing that the maker and drawer of said check was not authorized or entitled to make or draw the same."

This information was designated as the "(2nd) Substituted Information," the first having been filed on May 3, 1935, but substituted by another on August 17, 1935, which in turn was again substituted by the one first above mentioned. Demurrers, motions to set aside the information, motions for separate trials and for bill of particulars were

[fol. 107-a] all either overruled or denied. Each defendant entered pleas of "not guilty" and "former jeopardy by reason of a valid information in the same cause having been heretofore dismissed under such circumstances as to constitute a bar of another prosecution for the same offense."

The record discloses that at the outset of the trial each defendant was represented by counsel, but the defendant Elbert B. Lindsey objected to proceeding with the trial because he was unable to employ counsel and as counsel had just then been appointed for him and he had had no time to consult with his counsel or prepare his case, which objection was overruled. E. R. Lindsey objected to the introduction of any evidence on the ground that the information does not state a cause of action as to him. At the conclusion of the state's case motions to dismiss were denied, and at the conclusion of all the evidence, motions to dismiss or in the alternative to direct the jury to return verdicts of "not guilty" were also denied. Upon the return of the verdict of "guilty", each defendant on September 16, 1935, filed motions in arrest of judgment and for a new trial. On November 1, the court entered its judgment, sentence and commitment upon the verdict and four days later on November 5, each defendant gave notice of appeal. Thereafter a motion was made by one of the defendants to reopen the case on the motion for a new trial and in arrest of judgment or to set aside the verdict, judgment and sentence.

The court journal, under date of November 18, has the notation:

"Oral order of November 1st, 1935, denying motion for new trial. Order signed by court, November 18th, 1935. • • •

"Order denying motion to re-open and motion for new trial denied. Motion to arrest judgment denied, or to set aside verdict judgment and sentence as to him being void denied."

[fol. 108] On the same day the court entered two written orders, one denying motion to re-open the case on motion for new trial and arrest of judgment on the ground that the court had no jurisdiction, the defendants having given notice of appeal, and the other on the motion for a new trial recites that the motion and argument were heard on November 1, 1935, the court having made oral decision that such motion was denied and judgment entered, it was ordered

"that said motion for new trial be, and the same is hereby denied and entered, as of November 1, 1935."

Many errors are assigned but we feel that all except those which we will hereinafter discuss are without merit and it would serve no useful purpose to extend this opinion to discuss them all.

The first assignment is directed to the overruling of objections to the admission in evidence of statements attributed to one of the defendants in the presence of police officers while, as it is claimed, such defendant was held in custody and the statements were made under duress, all in violation of the constitutions of the United States and of this state.

From the evidence it cannot be said that as a matter of law there was duress, but in any event Rem. Rev. Stat., §2151, provides:

"The confession of a defendant made under inducement, with all the circumstances, may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

Certainly, the record discloses much corroborating evidence to sustain the admissibility of the written admissions.

Appellants argue at length upon the court's refusal to dismiss or direct a verdict of acquittal because of the discrepancy between the number of the check stated in the information and the number on the check introduced in evi- [fol. 109] dence upon which the convictions were obtained. This check was designated in the information as No. 2, while actually the number upon it was 21. This does not amount to a variance at law inasmuch as it is not of a material nature and neither one of the defendants was prejudiced nor the jury misled thereby. State v. Fairfield, 140 Wash. 349, 248 Pac. 810.

The contentions that the evidence fails to show intent to defraud or knowledge that there were no funds in the bank to meet the check is sufficiently answered by saying that there was evidence directly upon the question of knowledge and the intent is for the jury to determine from all of the facts and circumstances.

The assignment as to the evidence of other crimes is gov-

erned by our decisions in State v. Johnson, 141 Wash. 324, 251 Pac. 589, and State v. Martin, 176 Wash. 637, 30 P. (2d) 660.

The contention that the information was subject to demurrer or appellants were entitled to a bill of particulars is answered by State v. Price, 173 Wash. 108, 21 P. (2d) 1038.

Appellants claim that under the circumstances of this case they had already been placed in jeopardy by the abandonment of the earlier informations by the filing of the second substituted information. The contention is invalid. In State v. Navone, 180 Wash. 121, 39 P. (2d) 384, we said:

"We find no merit in appellant's assignments of error based upon the filing of the second information and appellant's trial thereon. The second information was filed in the same proceeding as the first, and manifestly superseded the same. If the state should attempt to bring appellant to trial upon the first information, an appropriate remedy would doubtless be available to him .

"Neither do we find error in connection with the refusal of the trial court to require the state to elect as to upon which information it would proceed. Appellant was placed upon his trial upon the second information. He does not argue that he was surprised by this action, and we find no basis for his contention that he was prejudiced by the ruling of the trial court in connection with the matters above referred to."

[fol. 110] The trial court is criticized because of its instructions relative to Rem. Rev. Stat., § 2601 (2) and § 2601-2. Each of these sections define a crime by the fraudulent issuance or passage of a check. The acts of the defendants complained of in the information constituting, as they did, but one transaction which involved both of these men it was proper for the court, where, as in this case, there were two statutes, one or both of which might have been violated, to instruct the jury as to both laws.

A number of assignments deal with the sentence. At the time the crime was committed on April 15, 1935, the law provided that the court fix the penalty at not more than fifteen years imprisonment (Rem. Rev. Stat., § 2605), and the minimum of not less than six months nor more than five years (Rem. Rev. Stat., § 2281). At the time of the trial, however, a new law had come into existence (Ch. 114, Laws

1935, Rem. Rev. Stat., § 10249, et seq.), which created a "board of prison, terms and paroles" and provided, among other things, (§ 10249-2):

"When a person is convicted of any felony • • • the court shall sentence such person to the penitentiary, or • • • to the reformatory, and shall fix the maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, • • •

"Within six (6) months after the admission of such convicted person to the penitentiary or the reformatory • • • the board • • • shall fix the duration of his or her confinement • • •."

It is claimed by appellant that this is an ex post facto law and, therefore, violative of Art. I, § 10, of the United States Constitution which, among other things, prohibits a state from passing such a law.

In Malloy v. South Carolina, 237 U. S. 180, it was held that the constitutional inhibition on ex post facto laws was intended to secure substantial personal rights against arbi- [fol. 111] trary and oppressive legislative action and not to obstruct mere alterations in conditions deemed necessary for the orderly infliction of humane punishment, citing Rooney v. North Dakota, 196 U. S. 319. It was further held that a law is not ex post facto within the constitutional prohibition that mollifies the rigor of the criminal law; but only those laws that create or aggravate the crime or increase the punishment or change the rules of evidence for the purpose of conviction fall within the prohibition, citing and quoting Calder v. Bull, 3 Dall. 386.

The amending act does not change or inflict a greater punishment than the law in force when the alleged crime was committed for the court could under the law in force at that time pronounce a maximum sentence of not more than fifteen years. The minimum and maximum punishments remain the same as before the enactment of the act of 1935. To the same effect upon this amendment to our parole law, see Andrus v. McCauley, et al, as yet unreported, in the District Court for the Eastern District of Washington, by Kavanaugh, District Judge, filed August —, 1936.

We are obliged to conclude that chapter 114, Laws of 1935, does not violate the prohibition contained in the Fed-

eral constitution regarding the passage of ex post facto laws.

We find no prejudicial error in the trial of the case and the judgment is affirmed.

Holcomb, J. Blake, J. Beals, J. Steinert, J. Geraghty, J.

We concur: Millard, C. J. Mitchell, J. Tolman, J. Main, J.

[fol. 112] In Supreme Court of Washington

Amended Præcipe—Filed December 23, 1936

Honorable Benj. T. Hart, Clerk of the Supreme Court, Olympia, Wash.

Sir:

In Re State of Washington, plaintiff, vs. Elbert B. Lindsey and E. R. Lindsey, defendants, No. 11046 of the Superior Court of Spokane County, No. 26004 of the Supreme Court of Washington

Please verify and certify under seal of your court the following files and records in the above entitled cause, for use of petition of Writ of Certiorari in the Supreme Court of the United States, a copy of which is herewith tendered you for such certification, together with your fee for same, and when so certified please return to us at the above address:

1. 2nd Substitute information.
2. Transcript of the evidence in the trial court, called in the State of Washington, a "Statement of Facts."
3, 4, 5 and 6—Exhibits 1, 2, 3 and 5.
7. Instructions to trial jury.
8. Verdict of the jury.
9. Judgments (two) fixing the term of sentences.
10. (15 pages) so much of defendants assignments of error filed on appeal in the Supreme Court of Washington as appear herein.
11. Notice of Supreme Court of affirmance.
12. Motion in Supreme Court for arrest of judgment on the grounds that defendants were denied the right to testify.
13. Affidavit in support of said motion.
14. Notice of overruling motion in arrest of judgment.
15. Remittitur of Supreme Court.

16. Motion of defendants for permission to Superior Court to re-open case.
17. Affidavit in support of same.
18. Additional affidavit for same.
19. Notice of denial of said motion to re-open.
20. Præcipe for certification.
21. Certificate to transcript.

Opinion of State Supreme Court.
(The assignments of error, extracts, will appear in the transcript as pages 65 to 79.)

Assignments already served.

Very respectfully, E. R. Lindsey. Elbert B. Lindsey.

Received copy this 18th day of Dec. 1936.
C. C. Quackenbush, Prosecuting Attorney, Spokane County, Attorney for State of Wash. H. E.

[File endorsement omitted.]

[fol. 113]

1104½ W. 2nd Avenue,
Spokane, Wash., Dec. 10, 1935.

Ralph E. Foley, Esq., Prosecuting Attorney, Spokane County, Wash.

SIR:

In re State of Washington, Plaintiff vs. Elbert B. Lindsey and E. R. Lindsey, Defendants, No. 11046 of Superior Court, No. 26004 of Supreme Court

The defendants, Elbert B. Lindsey and E. R. Lindsey herewith serve upon you a praecipe directed to the Clerk of the Supreme Court of the State of Washington, to certify under seal the documents and records therein listed and named, which record when so certified the defendants will use in their application to the Supreme Court of the United States for a writ of certiorari directed to said Supreme Court of Washington. And defendants also herewith serve upon you, copies of pages 78 to 92 inclusive of said record being the parts of the Assignments of error used in the Supreme Court of Washington, which defendants intend to present to the Supreme Court of the United States.

E. R. Lindsey. Elbert B. Lindsey.

Received copy of said praecipe and said pages 78 to 92 inclusive, this 10th day of December, 1936.

C. C. Quackenbush, Deputy Prosecuting Attorney, Spokane County, Washington, Attorney for State of Washington.

[File endorsement omitted.]

[fol. 114] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: In forma pauperis. Enter Elbert B. and E. R. Lindsey, pro se. File No. 41,200. Washington Supreme Court. Term No. 660. Elbert B. Lindsey and E. R. Lindsey, petitioners, vs. State of Washington. Petition for a writ of certiorari and exhibit thereto. Filed January 16, 1937. Term No. 660, O. T., 1936.

[fol. 115] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1937

The petition herein for a writ of certiorari to the Supreme Court of the State of Washington is granted, limited to the question as to whether Chapter 114 of the Laws of Washington of 1935, as here applied, is invalid as an ex post facto law within the meaning of Art. 1, Sec. 9, par. 3, of the Constitution. The case is assigned for hearing on Monday, May 3, 1937.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JAN 16 1937
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 660

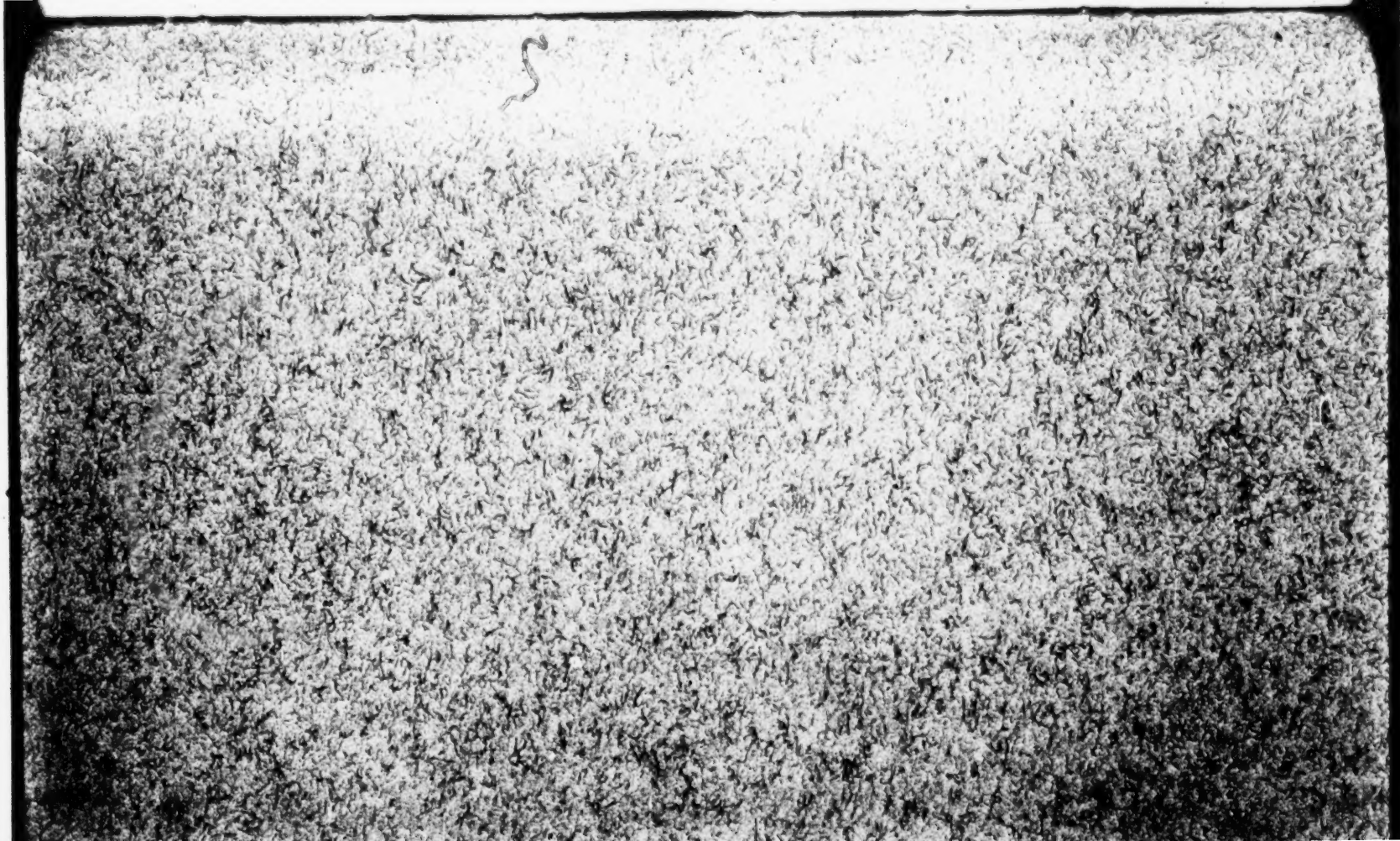
ELBERT B. LINDSEY AND E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON AND BRIEF IN SUPPORT THEREOF.

ELBERT B. LINDSEY,
Pro se.
E. R. LINDSEY,
Pro se.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 660

ELBERT B. LINDSEY AND E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners respectfully show to this Honorable Court:

I.

This petition is prayed for in order that this Court may grant a review of a final decision of the Court of last resort of the State of Washington, and to set aside the decision of said Court (Opinion, R. 87-92) (Remittitur, R. 76).

It is first contended that the sentences (terms of imprisonment) of "Not more than 15 years" (R. 50, 51) of the Superior Court of Spokane County, Washington, and affirmed by the said Supreme Court, are void, as being awarded under a law, passed after the commission of the alleged offense, and which changed the condition of petitioners to their disadvantage, and increased the term of their imprisonment; changed the fixing of their sentences

from a judicial tribunal to a ministerial board, and orders petitioners sent to a penal institution, with only a general sentence; the term of their imprisonment not being fixed until some time within six months after petitioners are received at the penal institution, and then fixed by the said ministerial board, and the law not providing for any "fixing of sentence" so long as petitioners remain in the County Jail, while their case is on appeal, although if so confined their sentence commenced at the date of the judgment and sentence; and said law providing, in certain instances, their terms may be extended beyond that set out in the statute denouncing the offense.

Petitioners presented this question to the said Supreme Court by assignment of error (R. 63):

> "The law under which defendants were tried, convicted and sentenced was, and is, as to them void, being an *ex post facto* law, being in direct violation of Section 10, of Article 1, of the Constitution of the United States: No state shall • • • pass any • • • *ex post facto* law."

And the said Supreme Court, in its opinion (R. 91-92) said:

> "We are obliged to conclude that chapter 114, Laws of 1935, p. 308, does not violate the prohibition contained in the Federal Constitution regarding the passage of *ex post facto* laws."

On September 3, 1935, the Prosecuting Attorney for Spokane County, Wash., charged petitioners, by substitute information (the first information was filed May 3, 1935) (R. 1) with the alleged crime of Grand Larceny, as follows:

> "That the said defendants, Elbert B. Lindsey and E. R. Lindsey in the County of Spokane, State of Washington, on or about the 15th day of April, 1935, then and there being, did then and there wilfully, unlaw-

fully, feloniously and fraudulently, by color and aid of a check in words and figures as follows, to-wit:

" 'Spokane, Wash., Apl 15, 1935. No. 2.

Spokane and Eastern Trust Company

Pay to the order of Elbert B. Lindsey $40.00.
Forty 00 - - - - Dollars.

E. R. LINDSEY.'

"and endorsed on the back thereof: Elbert B. Lindsey, 1104½ W. 2nd Ave., Co. Service National Guard: obtain from Peter M. Jacoy Forty Dollars ($40.00) in money and currency of the United States of America, of the value of forty dollars, and the property of the said Peter M. Jacoy, the owner thereof, the said defendants then and there knowing that the maker and drawer of said check was not authorized or entitled to make or draw the same."

This information was brought under Rem. Rev. Stat. of Washington, set out in the instructions (R. 44) as follows:

"You are further instructed that the laws of the State of Washington, Section 2601, sub-division 2 provide as follows:

"Every person who with intent to deprive or defraud the owner thereof—shall obtain from the owner • • • the possession of • • • personal property by color or aid of any order for the payment or delivery of property or money of any check, knowing the maker or drawer of such check was not authorized or entitled to make or draw the same, steals such property and shall be guilty of larceny."

Said section being a section (2) of Rem. Rev. Stat. 2601, Larceny, #349.

There was also in force and effect at all times in this State, Rem. Rev. Stat. 2605, Grand Larceny, #353:

"Every person who shall steal • • • in any manner specified in section 349 of this Act:

(5) Property of the value of more than twenty-five dollars, in any manner whatever—

> Shall be guilty of grand larceny and be punished by imprisonment in the state penitentiary for not more than fifteen years."

A trial was had on Sept. 12, 1935, on the information herein set out (R. 1).

> (R. 3) "Be it remembered, That heretofore and to-wit, on the 12th day of September, A.D., 1935, the above entitled cause came on for trial on the pleadings heretofore filed herein—."

A joint verdict of "GUILTY as charged in the information" was returned on "this 14th day of September, 1935." (R. 49.)

And E. R. Lindsey was sentenced for "a term of not more than Fifteen years." "Done in open court • • • this 1st day of November, 1935." (R. 50.) And the same sentence, of the same date, as to Elbert B. Lindsey (R. 51).

On April 15, 1935 (the date of the alleged commission of the offense charged) there was in force in the State of Washington, a law Rem. Rev. Stat. Sec. 2281, Indeterminate Sentences, #29:

> "Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the State Penitentiary, or in the Washington State Reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment."

There was also in effect on said date, April 15, 1935, the following statutes of the State of Washington, Rem. Rev. Stat. Sec. 2190, Judgment, #1114-352:

> "After verdict of guilty, or finding of the court against the defendant, if the judgment be not arrested, or a new trial granted, the court must pronounce judgment."

Rem. Rev. Stat., Sec. 2196. Defendant must be personally present. #1115-353.

> "For the purpose of judgment, if the conviction be for an offense punishable by imprisonment the defendant must be personally present • • •."

Rem. Rev. Stat., Sec. 2172. Court shall fix punishment. #1103-311:

> "When the defendant is found guilty, the court and not the jury shall fix the punishment to be inflicted."

On June 12, 1935 (after the date of the offense charged), a new law went into effect in the State of Washington, being Chapter 114, Laws of Washington, 1935, p. 308, which in terms repealed Rem. Rev. Stat., Sec. 2281, the Indeterminate Sentence Law, and in Sec. 1 (Rem. Rev. Stat., Sec. 10249-1), created a "board of prison, terms and paroles" to administer the Act.

Sec. 2 of said Act (Rem. Rev. Stat., Sec. 10249-2) provides:

> "When a person is convicted of any felony except treason, murder in the first degree, carnal knowledge of a child under ten years, or of being a habitual criminal within the meaning of the statute which provides for life imprisonment for such habitual criminals, and a new trial is not granted, the court shall sentence such person to the penitentiary • • • and shall fix the maximum term of such person's sentence only.
>
> "The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which

such person was convicted, if the law provides for a maximum term • • •.

"If the sentence of a person convicted is not suspended by the court, it is hereby made the duty of the superintendent of the penitentiary • • • to receive such person • • • and to imprison him or her until released under the provisions of this act or through the action of the governor.

" • • • It will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance what, in their judgment, shall be the duration of such convicted person's imprisonment.

"Within six months after the admission of such convicted person to the penitentiary • • • the board of prison, terms and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

"When a convicted person appeals from his or her conviction and is at liberty on bond pending the determination of his or her appeal by the Supreme Court, credit on his or her sentence will begin from the date of the remittitur. In all other cases, credit on a sentence will begin from the date the judgment and sentence is signed by the court. • • •

"Any convicted person undergoing sentence in the penitentiary or the reformatory, not sooner released under the provisions of this section, shall, in accordance with the provisions of existing law, be discharged from custody on serving the maximum punishment provided by law for the offense for which such person was convicted • • •."

Sec. 3 of said Act (Rem. Rev. Stat. 10249-3) provides:

"To assist in fixing the duration of a convicted person's term of confinement • • • " (the board shall do certain things therein enumerated, and not material here).

Sec. 4 of said Act. (Rem. Rev. Stat. 10249-4) provides among other things:

> "the board • • • shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion." • • •
>
> "From and after the suspension, cancellation or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term.
>
> "The provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the penitentiary or the reformatory, to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all the inmates thereof."

Sec. 3 of said Act further provides:

> "Every prisoner who has a favorable record of conduct at the penitentiary • • • and in whose behalf the superintendent • • • shall file a report • • • shall upon, but not until the adoption of such recommendation by the board • • •, be allowed time credit reduction from the term of imprisonment fixed by the board • • •."

Sec. 4 of the Act also provides:

> " • • • in no case shall the inmate be credited with more than one-third of the sentence as fixed by the board."

Petitioners claim that their sentences being for a flat term of "not more than fifteen years" and without a minimum being fixed as provided by R. R. S. Sec. 2281, shows plainly that they were sentenced under the provisions of this enactment of 1935; that by that enactment and the repeal of Sec. 2281, their condition was changed to their

disadvantage after the date of the alleged commission of the offense; that their terms of imprisonment were lengthened; that the discretion to fix the sentences was taken from judicial authority and placed in a ministerial board; that if the "term" is to be fixed some time within six months after they enter the penal institution, that they are being subjected to and will be subjected to a long term of imprisonment, *without serving it under any definite term of imprisonment being as yet fixed,* and yet, *they are ordered delivered into the custody of the authorities for final imprisonment.* This was not the law on April 15, 1935, and such sentence as pretended to be imposed, is *ex post facto* and void.

II.

The second contention rests upon the ground that all the proceedings had in this case were violative of those principles of justice that are ranked as fundamental; that the action of the state, by its agents, was contrary to the fundamental principles of liberty and justice and that the whole proceeding was a wrong so fundamental that it was a mere pretense of a trial and rendered the conviction and sentence wholly void, under the rights guaranteed to petitioners under the V, VI, and XIV amendments to the Constitution of the United States.

This was done by the State by the following unlawful methods:

(a) By coercing one of the defendants, Elbert B. Lindsey, and compelling him to give evidence against himself, not when called on the witness stand, but in a "star" chamber proceeding:

> (R. 20.) (By Quackenbush for the State:) "Q. Isn't it true that I had charge of most of the questioning over there at the station? A. Yes." (His name, Quackenbush, is also endorsed on the written statement States Exhibit 2, R. 49.)

"I am 25 years old." (R. 18.) "He was ill and under the doctor's care for some time." (R. 17.) "At the time Elbert was examined he was in jail." (R. 12.) "We had both the father and son in custody on the 17th." (R. 12.) "At the time Elbert was arrested we did not have any warrant for him." (R. 12.) "I didn't file any complaint against the son. Elbert never had any hearing in police court as far as I know." (R. 12.) "Elbert had been confined right around two days before we showed him the check." (R. 15.) "Did they tell you (Elbert) what the charge was against you? A. Not specifically." (R. 19.) "Q. (By Quackenbush, Deputy Prosecutor for State): "This state's exhibit No. 1, is the check we were 'quizzing' you about? A. Yes." (R. 21.) "At no time during the examination by police officers or by Mr. Quackenbush was his father or mother present." (R. 12.) "Yes, we had two or three talks with him." (R. 15.) "I think I was down there (in the quizzing room) about five times and then taken back to jail." (Elbert R. 18.) "Captain McCarry said: 'I will throw you back in the cell'." (R. 22.) "They said to me, there is five to one against you and when you get into court if you don't sign it it will be used against you." (R. 21.) "And they said it didn't make any difference whether I signed it or not 'we will gang up on you in court and there is five of us to one of you." (R. 21.)

(R. 21.) (Question by Quackenbush:) "Was it in my presence or out of my presence that you say that you requested three or four times for an attorney? A. It was in your presence."

"Well, I got tired of fighting them for two days, and I decided that I would sign it." (R. 22.) "I asked three or four times for an attorney to be present so I would be represented, but I was refused." (R. 19.)

"Q. (By Quackenbush to Elbert:) Now I show you state's exhibit No. 2 for identification and ask you to examine and state what that is?

A. That is my signature. Q. Read it over? A. I signed it for the reason that I was brought down there

and it was shown me and I read it and I told you it was not what I said, but they said to me 'there is five to one' against you and when you get into court if you don't sign it it will be used against you." (R. 21.) "It is not what I said, but somebody said 'there is five against one and it didn't make any difference whether I signed it or not, as we will go into court and testify against you anyway.' " (R. 21-22.)

This Exhibit No. 2, the statement was introduced against both defendants, without limitation (R. 22) and is found set out in record at (R. 37-38).

This matter was raised in the Supreme Court of the State, and that Court disposed of it as follows (R. 89):

(1) The first assignment of error is directed to the overruling of objections to the admission in evidence of statements attributed to one of the defendants in the presence of police officers while, as it is claimed, such defendant was held in custody and the statements were made under duress, all in violation of the Constitution of the United States and of this state.

From the evidence, it cannot be said that as a matter of law there was duress; but, in any event, Rem. Rev. Stat., paragraph 2151 (P. C. paragraph 9217), provides:

"The confession of a defendant made under inducement with all the circumstances, may be given as evidence against him, except when under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony."

Certainly, the record discloses much corroborating evidence to sustain the admissibility of the written admissions.

The question of such proceedings being in violation of the Constitution of the United States was avoided, and is yet undetermined.

The said Quackenbush, prosecutor, having thus procured all he could "extract" by coercion, then proceeded to his next step in endeavoring to obtain a void and illegal conviction of petitioners in this case, as follows:

(b) That he prepared by his own act and secured *by his own act* illegal and void judgments of convictions of petitioners which he might and did use to impeach petitioners in this case before they could have them set aside, by the following means:

That on May 3, 1935 (R. 66), the said Quackenbush filed two criminal informations against petitioners; the one being the one at bar (in which a substitute information was afterwards filed), and the other being a charge of "Attempted Grand Larceny", the offense alleged to have been committed on or about April 17, 1935. This information—known herein as case No. 11045-25867—was brought under the same State statutes hereinbefore set forth, with the additional fact that it was called an "attempt" and the State laws provided a penalty of "one-half of that for Grand Larceny."

This case, No. 11045-25867 was brought on for trial on June 12, 1935—the morning after the new law, Chap. 114, Laws of 1935, went into effect and the R. R. S. Sec. 2281 had been repealed. A verdict of guilty was secured, and judgments and sentences entered against each of petitioners with a sentence of "not more than seven and a half years" (R. 38, 40). (Exhibits 3 and 5 in this case.)

These sentences were illegal and void under Article 1, Section 10, of the United States Constitution, under the same conditions as urged as to the sentences in the case at bar, heretofore (without repeating).

But said Quackenbush, for the State did not stop there;

in order to obtain that conviction he stated to the trial jury of and concerning petitioner E. R. Lindsey (R. 71):

> "But so far as E. R. Lindsey is concerned he is so hardened in crime that there is no hope that he will ever reform."

and of and concerning Elbert B. Lindsey (R. 71):

> "If we want to send Elbert B. Lindsey to the penitentiary as his counsel has suggested, we have a much greater crime that we could have charged him with than this; one that he might have been charged with and much more easily convicted; this is just a small matter."

The said Quackenbush knowing at the time that his statements were false and untrue, and his statements were in fact false.

The false and fraudulent and illegal and void judgments and sentence so obtained by said Quackenbush, were the identical judgments and sentences used as Exhibits No. 3 and 5 (R. 38, 40) as against Elbert B. Lindsey (R. 22-23) and as against E. R. Lindsey (R. 31-32).

That the said Quackenbush used said judgments and sentences on Sept. 12-13, 1935, for impeachment, and before petitioners could have them set aside.

That said convictions, judgments and sentences were set aside by the Supreme Court of Washington, by an opinion of date January 10, 1936, found—*State* v. *Lindsey*, 185 Wash. Rep. at 206, 52 Pac. (2d) 1246, on the ground as stated in the decision of "misconduct of state's counsel." The same counsel, Quackenbush, who conducted the case at bar.

After said judgments and sentences were set aside petitioners moved in the State Supreme Court (R. 65, *et seq.*) to arrest the present judgments on the ground of such re-

versal of the former judgments used for impeachment (R. 65) as follows:

> "The affirmance by this court on Aug. 20, 1936, Vol. 87 Wash. Dec. 298, and thereby directing that the defendants, and each of them be deprived of their liberty by the State of Washington, for a term of 15 years, is a direct denial of the rights of the defendants, as guaranteed to them by the VI and XIV amendments to the Constitution of the United States • • •."

And further such decision, in the words of this Supreme Court of Washington, as announced in *State* v. *Harrass*, 22 Wash. 57, 60 Pac. 58:

> "It would be a shame and a reproach to the law to hold the defendants accountable for the law's mistakes."

In that the defendants and each of them were in all substantial effect, and in contemplation of the laws and Constitutions mentioned:

1. Each defendant denied the right to testify in his own behalf.

2. Each defendant denied the right to call witnesses in his own behalf.

3. Each defendant was denied a fair and impartial trial (R. 65).

That the defendants and each of them are denied the rights guaranteed to them by the 14th Amendment to the Constitution of the United States, by this Supreme Court failing, neglecting and refusing to pass upon the question fairly presented to them in this case as to the rights of the defendants under the laws and Constitutions, when as in this case, although as the court announced in its decision that the impeachment and annulment of the testimony of defendants, and their witnesses by the introduction of the

records of a previous conviction of a felony was without error by the trial court, of the effect on the rights of the defendants, when, before final decision in this court, and while the jurisdiction is solely in this court, this court renders a decision that the same previous convictions used for impeachment and annulment of testimony, *were illegal*, and obtained by misconduct of the Prosecuting Attorney (the same one who tried this case).

This motion was denied, without opinion (R. 75).

That thereupon, and after the remittitur was returned to the Superior Court, petitioners moved (R. 76, *et seq.*) the Supreme Court for leave to the Superior Court to re-open, so as to allow petitioners to show the fact of the reversal of the judgments used for impeachment, in which motion it was stated:

> (R. 77) "And by reason of which defendants and each of them were denied a fair trial as guaranteed by the XIV amendment to the Constitution of the United States, and in contravention of the said constitution • • • and in all substantial effect wrongfully and illegally deprived defendants, and each of them of their right to testify in their own behalf, they so offering themselves, and denied them the right to call witnesses, by reason of what is sometimes called a mistake in law, for which the defendants or either of them were in no way responsible, and for which the State of Washington alone was responsible, in that at the time of trial, defendants took the witness stand and called each other as witnesses, and that the State of Washington offered in evidence and read to the jury, and put in evidence, a certified copy of a previous conviction of each of the defendants on a felony charge, exhibits 3 and 5, in cause No. 11045 of the said Superior Court, No. 25867 of this Supreme Court, for the purpose of impeaching the testimony of defendants and each of them, and it did have such effect; that thereafter and to-wit, on January 10, 1936, and after the jurisdiction of this

case was in the Supreme Court, this Supreme Court reversed and set aside said judgments of conviction in said cause No. 11045-25867.

That it is very material for defendants and their rights under the Constitution of the United States and of this State to be afforded an opportunity to present the fact before some court that the said judgments so used for impeachment were set aside; that under the practice of this state, the trial court is the only court that can hear such evidence; that the said Superior Court is without jurisdiction to do so unless such permission is granted by this court; that the final judgment has now been entered by this court, and returned to the Superior Court, and that it is but natural and proper justice that defendants be afforded an opportunity to present the facts above set out to the Superior Court of Spokane County, Washington, and that this court grant permission for such to be done."

This motion was supported by affidavits (R. 78-86).

This motion to re-open was denied without opinion (R. 86).

Petitioners' testimony in this case in their own defense has always been burdened with the illegal and unlawful aspersions cast upon it by the use of the illegal and void sentences, Exhibits 3 and 5 (R. 38, 40) *and petitioners have at all times been denied the right to show this fact in any judicial tribunal of this State.*

Petitioners have been denied by the Supreme Court of the State of Washington, their most valued fundamental right, of being accorded a trial in which they were allowed to defend themselves when assailed in court by the State, and not through any fault of their own but solely and alone by the illegal acts of the State of Washington, by its agent the said Quackenbush, acquiesced in by the Supreme Court.

Petitioners have never yet had a trial.

Petitioners speak of the judgments being illegal and the sentences being void (*i. e.*, the ones used for impeachment)

and this applies as well to the ones at bar, for such sentences have been held void by the United States District Court for the Eastern District of Washington, Southern Division, at Walla Walla, Wash., in a case involving the enactment of 1935, Chap. 114, Laws of Wash. 1935, in the case of *Andrus* v. *McCauley et al.*, Cavanah, District Judge, No. L. 1421, Nov. 21, 1936. (As the opinion is long but bears directly on the question a full copy is appended to brief.)

(c) That petitioner Elbert B. Lindsey had been denied the assistance of counsel by the State at the time that the said Quackenbush, Prosecutor, conducted his "quizzing" and coercion, as hereinbefore set out at page 8-10.

He had been arrested on April 17, 1935, as set out *supra*, and at the time of the trial, September 12, 1935, the testimony of police officers was: (R. 15) "I don't know as they have ever been out of jail since then" (April 17, 1935).

When Elbert B. Lindsey was brought in for trial on the 12th of September, 1935, he again demanded counsel, and finally, just as the case started (R. 3) counsel was appointed for him; he then objected to proceeding by reason of the fact that he was not allowed to consult with counsel or prepare his defense, but this objection was overruled, and the trial ordered to proceed. (See also opinion of Supreme Court (R. 88) to the same effect.)

This was a denial of the rights guaranteed to him under the VI Amendment to the Constitution of the United States, that he should have the assistance of counsel for his defense.

(d) At the trial Peter M. Jacoy, the party whom it was alleged paid the money on the check, was called and testified (R. 4):

> "It must have been between the 15th and 16th of April but I would not say which one of those dates, I saw that gentleman over there (indicating Elbert B. Lindsey) at 402 Sprague Avenue at my place of business.

He came in and wanted the clerk to cash the check and the clerk turned this over to me • • • I had seen him in there previously and knew him by sight, and so I went ahead and cashed the check."

The charge in the information (R. 1) was

"That the said defendants, Elbert B. Lindsey and E. R. Lindsey • • • did • • • obtain from Peter M. Jacoy $40.00."

The State and defense both rested (R. 35) and the following proceedings were had (R. 35):

"Comes now the defendant E. R. Lindsey, at the close of all the evidence and renews his motion to dismiss as to him, or in the alternative that the court direct the jury to return a verdict of not guilty on the following grounds:

(1) That there is a fatal variance between the charge in the information and the proof adduced at the trial.

(2) That the evidence fails to show any act on the part of the defendant towards the commission of the crime charged.

(3) That the evidence fails to show any intent to defraud and there is not even any evidence on which an inference of intent could be based.

(4) That neither the law nor the evidence would justify the jury in returning a verdict of guilty against this defendant.

(5) That any verdict so returned would be contrary to the evidence and not supported by any evidence.

(6) That all the evidence in the case would not warrant a verdict of guilty against this defendant."

And a separate motion to like effect was made as to Elbert B. Lindsey (R. 36).

The trial court then, on the advice of the prosecutor, Quackenbush, attempted to, and did charge, defendants, and

especially E. R. Lindsey, with another offense, one not charged in the information, and one, if charged at all, which would require additional allegations of fact in the information, prior to defendants being put upon trial; and in substantial effect charged petitioners with *two* offenses—that is, gave to the trial jury two offenses—one charged in the information, and one not so charged—to consider against petitioners, by the following means (R. 44):

> "You are instructed that the laws of the State of Washington, (Remington's Compiled Statutes 2601-2), provide as follows:
>
> "Any person who shall with intent to defraud make, or draw, or utter, or deliver to another person any check, or draft, on a bank or other depository for the payment of money, knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or depository, to meet said check, in full upon its presentation, shall be guilty of larceny. The word "credit" as used herein shall be construed to mean an arrangement or understanding with the bank for the payment of such check or draft, and the uttering or delivery of such a check or draft to another person, without such fund or credit to meet the same shall be prima facie evidence of an intent to defraud."

You are further instructed that the laws of the State of Washington, Section 2601, sub-division 2 provide as follows:

> "Every person who with intent to deprive or defraud the owner thereof • • • shall obtain from the owner • • • the possession of • • • personal property by color and aid of any order for the payment or delivery of property or money or any check, knowing the maker or drawer of such check was not authorized or entitled to make or draw the same, steals such property and shall be guilty of larceny."

This last statute, 2601, sub-div. 2, was the one under which the information (R. 1) was drawn.

The first statute 2601-2, requires additional allegations in the information, *which were never charged in any information in this case*, to-wit:

(1) That some particular person drew the check.

(2) That it was delivered to some person, and

(3) That it was drawn on a bank or depository for the payment of money.

Then the court charged the jury as to E. R. Lindsey (R. 44-45).

You are instructed that before you can convict the defendant E. R. Lindsey, you must find from the evidence beyond a reasonable doubt:

> "(1) That on or about the 15th day of April, 1935, in Spokane County, Washington, he made the check described in the information herein and delivered it to his son, Elbert B. Lindsey, co-defendant herein."

There was no such charge in the information (R. 1).

> (2) "That the making and delivery of said check, if any, by said E. R. Lindsey was with an intent to defraud some person, or persons."
>
> (3) "That at the time of the making and delivery, if any, said E. R. Lindsey knew that he did not have either funds or credit with the Spokane and Eastern Trust Company, the bank upon which it was drawn, to meet said check upon its presentation."

There was no charge in the information that the so-called check was drawn on a bank or depository for the payment of money.

And as a matter of fact the document shows on its face that it was drawn on "a trust company" which is not prima facie a bank or depository for the payment of money, and neither was there any evidence in the case that it was a "bank."

"(R. 45) "If you find each of the foregoing elements in this case to have been established by the evidence beyond a reasonable doubt, then you would find the defendant E. R. Lindsey guilty as charged in the information."

(But those elements were not charged in the information.)

"If, on the other hand, the State has failed to prove each of the foregoing elements to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant, E. R. Lindsey."

So if the jury found all the elements charged by the instructions against E. R. Lindsey, *it was proof without allegation,* and on which E. R. Lindsey could not be convicted.

It was a charge to the jury to acquit E. R. Lindsey, and in law he must have the benefit of it. He was acquitted, notwithstanding the verdict to the contrary.

The court then further charged the jury (R. 46):

"You will note from the instructions heretofore given you herein that the specific charge upon which the defendant E. R. Lindsey is being tried, is that of issuing the check in question, with an intent to defraud, knowing at the time of the issuance of said check that he had neither sufficient funds, nor credit with the bank upon which it was drawn."

Again a charge without allegation in the information.

Then the court charged the jury as to Elbert B. Lindsey under the allegations in the information (R. 45-46) and under R. R. S. Sec. 2601 sub-div. 2, set out *supra.*

And then charged the jury (R. 46):

"If the state has established these charges as to each of the defendants herein by the evidence in the case beyond a reasonable doubt, then you should convict the said defendants."

That is to say on a joint charge in the information (R. 1) and under a charge to the jury of one set of facts and law

not charged in any information, find E. R. Lindsey guilty, and on a different set of facts and law find Elbert B. Lindsey guilty, *then find them jointly guilty of the offense charged in the information.*

This question was raised by assignments of error in the Supreme Court of Washington (R. 52-60) and at (R. 58) as follows:

> "This trial and the procedure had thereunder and the instructions quoted above violate the IV, V, VI and XIV Amendments to the Constitution of the United States."

And again at (R. 60) in speaking of the instructions:

> "This was in plain violation of the rights of the defendants under the Constitution of the United States and of this State, as to "due process."

The State Supreme Court disposed of the matter in its opinion (R. 90), as follows;

> (7) "The trial court is criticized because of its instructions relative to Rem. Rev. Stat. Par. 2601, sub. (2) and 2601-2 (P. C. Paragraphs 8944, 8887). Each of these sections defines a crime by the fraudulent issuance or passage of a check. The acts of the defendants complained of in the information constituting, as they did, but one transaction which involved both of these men, it was proper for the court, where, as in this case, there are two statutes, one or both of which might have been violated, to instruct the jury as to both laws."

The Supreme Court of the state totally ignored the fact that R. R. S. Sec. 2601-2 (P. C. 8887) required additional allegations, over and above R. R. S. 2601 sub-2, and that the additional allegations were not in the information, and that it is not due process of law under the Federal Constitution to convict a person without allegations, that is, without notice; proof, even if it existed is unavailing without allegations.

It was a trial as to neither petitioner.

(e) Although the verdict (R. 49) was in form a verdict of conviction, yet, in law, as the case had been closed, and the defendants had rested, they were at that time entitled to have their guilt or innocence put before a jury properly; and as to E. R. Lindsey, the verdict was directly contrary to what the court charged the jury. And it being a joint trial, it was in law a verdict of acquittal as to both petitioners, and the court erred in adjudging the petitioners guilty (R. 50-52) and the Supreme Court erred also in affirming the judgment of guilty, and not adjudging it a verdict of acquittal.

This question was also raised in the Supreme Court by assignments of error (R. 52-60), where at (R. 55-56) it was claimed:

> "Thus trying two defendants, in one trial, under one information, for two distinct, unrelated crimes, under different statutes, with different penalties, each offense requiring distinct evidence, and neither defendant taking part in the other's offense, and each offense requiring different instructions to the jury, on a distinct state of facts. This cannot be done under our laws and constitution, and neither E. R. Lindsey nor Elbert B. Lindsey can lawfully be convicted under such a condition. There was no jurisdiction as to either."

This question was again raised in the State Supreme Court by assignment (R. 61) as follows:

> "To submit to a trial jury such instructions as hereinbefore set out and direct them to find a verdict of guilty if they find those elements established by the facts, when there has been no information filed, and none of the legal formalities complied with, violates the provisions of the Constitution of the United States in the following particulars:"

Violates Article XIV (14th amendment) wherein it is stated:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States; nor shall any state deprive any person of life, liberty or property, without due process of law;"

But the State Supreme Court absolutely ignored this question in its opinion, and refused to pass on the same.

B.

The following reasons are here set forth and relied upon for the allowance of this writ of certiorari:

I.

That the sentences in this case (R. 50, 51) are void as being rendered under a law, and in accordance with a law, which took effect after the date of the alleged commission of the offense, and which changed the situation of petitioners to their disadvantage, and lengthened their term of sentence, in contravention of Article 1, Section 10, of the Constitution of the United States.

II.

That the sentences put before the jury and used for impeachment (R. 38, 40) were void for the same reason set out *supra*.

III.

That the convictions on which the judgments and sentences in this case were founded (R. 49) were obtained by the State of Washington, by means and methods which were such a denial of the fundamental rights of petitioners, under the XIV amendment to the Constitution of the United States, as to render them wholly void, in the following particulars:

(a) By the illegal seizing of petitioner Elbert B. Lindsey, without process, and while so being held by police officers and denied the right of counsel, and being held incom-

municado, while ill, by the State of Washington, through an illegal examination by said C. C. Quackenbush, Deputy Prosecutor for the State, put through an examination and coerced into making statements to be used and which were used against both defendants at their trial.

(b) By the State of Washington, in another trial, conducted by said C. C. Quackenbush, the State's officer, obtaining convictions against each of defendants, which were illegal and void, by the direct acts of said Quackenbush, in his misconduct before the trial jury, and then having entered on said convictions, sentences as to each of petitioners which were void, as being rendered under a law which was *ex post facto* as to petitioners, and then before said judgments and sentences could be set aside, using the same to impeach and cast aspersions and unlawful burdens on the testimony of petitioners, when they offered themselves as witnesses; that when said convictions and sentences were first set aside by the Supreme Court of the State, and then such sentences held to be void by the Courts of the United States, and then denying petitioners any opportunity in any court of the State to show the fact that the convictions and sentences were void and illegal, and had been so declared by the courts.

(c) By denying to petitioner Elbert B. Lindsey the right to be represented by counsel at the time of the examination by the State's officer when first seized, and again denying him counsel in all substantial effect by not allowing him counsel until just as the trial started, and denying him the right to consult with counsel and prepare his defense.

(d) By the action of the State at the close of the trial, and the parties had rested, and there was no evidence against E. R. Lindsey under the acts charged in the information, and the State then charging the trial jury as against E. R. Lindsey, under a different statute, which was not

charged in the information and which required additional allegations, with which he had not been charged, and putting to the trial jury as allegations on which they could find him guilty, allegations of acts with which he had not been charged in any information.

(e) That by charging the jury also as to Elbert B. Lindsey, it being a joint trial, on a joint charge, with another statute and another state of facts as to his co-defendant, and then by charging the jury that if they found one defendant guilty of one offense (not charged) and found the other defendant guilty of a different offense, to then find them jointly guilty as charged in the information.

(f) That by entering judgment against E. R. Lindsey, when E. R. Lindsey had challenged the sufficiency of the evidence and the court instructed the jury "that if they did not find him guilty of the offense (not charged in the information) under a different statute, that they should acquit him."

(g) That by entering a judgment against Elbert B. Lindsey on a joint charge, tried with another defendant, and on a joint verdict, when the statutes and acts were several.

(h) That petitioners' rights under the several constitutional provisions and under the procedure adopted was set up in the Supreme Court of the State, was fully claimed, and that court denied the challenged, refused to apply the corrective and refused to protect petitioners rights under the said provisions of the Constitution of the United States.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of Washington, commanding that court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete tran-

script of the record and all proceedings in the case numbered and entitled on its docket, No. 26004, the State of Washington, respondent *vs.* Elbert B. Lindsey and E. R. Lindsey, appellants, and that the said judgment of the Supreme Court of the State of Washington may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

ELBERT B. LINDSEY,
E. R. LINDSEY,
In Propria Personam.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 660

ELBERT B. LINDSEY AND E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON,
Respondent.

PETITIONERS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

MAY IT PLEASE THE COURT:

The final opinion of the court of last resort of the State of Washington, the Supreme Court, is reported in Vol. 87, Washington Decisions, No. 5, of Sept. 2, 1936, at page 298; 61 Pac. (2d) 293. A full copy set out in Record pp. 87-92.

This opinion affirms the conviction and sentence of the Superior Court of Spokane County, Wash., as to each petitioner (R. 50, 51), wherein each petitioner is sentenced to a term of imprisonment of "not more than fifteen years", in the penal institutions, and

> "The said defendant (s) is hereby remanded to the custody of the sheriff of said county to be detained and delivered into the custody of the proper officers for transportation to, and confinement in said institution."

That under its constitution the said Supreme Court is the court of last resort of the State of Washington:

> "The judicial power of the state shall be vested in a Supreme Court, superior courts, etc." Art. VI, Sec. 3 Const.

II.

Jurisdiction of This Court.

The jurisdiction of the United States Supreme Court over the subject matter embraced in this petition is upheld by:

Art. III, Sec. 2, of United States Constitution:

> "The judicial power shall extend in all Cases, in Law and in Equity, arising under this Constitution • • •"

and by Sec. 237 of the Judicial Code of the United States, being Act of Feb. 13, 1925, Chap. 229, 43 Stat. 936, being Sec. 344, Title 28, U.S.C.A., page 205, as follows:

> "SEC. 237 (b). It shall be competent for the Supreme Court by certiorari, to require that there be certified to it for review and determination • • • any cause wherein a final judgment or decree has been rendered or passed by the highest court of the state in which a decision could be had where is drawn in question • • • the validity of the statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States; or where any right, privilege or immunity is specially set up or claimed by either party under the constitution • • •."

(2) Section (a) of the Act of Congress of Feb. 13, 1935, (U. S. Code, Title 28, Sec. 350; 43 Stat. L. 936) provides:

> That no • • • certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree • • •.

The final judgment in this case is dated Nov. 2, 1936, and filed in the Superior Court Nov. 4, 1936 (R. 76).

The date of the judgment on remittitur is the date from which the "three months" commences to run, as was held in:

Puget Sound Light & Power Co. et al. v. *King County*, 264 U. S. 22.

The application for writ of certiorari was presented to the Clerk of the United States Supreme Court on the 16th day of January, 1937 (R. 94).

(3) Does the record sustain jurisdiction?

(a) The judgment asked to be reviewed is final. The Supreme Court said (R. 92):

> "We find no prejudicial error in the trial of the case, and the judgment is affirmed."

The judgment (s) (R. 50, 51): are sentences of each petitioner to a term of imprisonment of "not more than fifteen years." "That the said defendant shall stand committed to said institution (penitentiary and reformatory) until this sentence is complied with."

(b) It is a judgment of the court of last resort of the State of Washington. Art. VI, Sec. 3 of State Const., (quoted *supra*).

(c) The first question, that the sentences are void as being *ex post facto*, is a direct question under the Federal Constitution.

The sentences (R. 50, 51) for a term of "not more than fifteen years" are the maximum sentences provided by the statutes of the State for Grand Larceny, R. R. S. 2605 (set out p. 3-4 of petition) and are such sentences as are directed to be pronounced under Chap. 114, Laws of Wash. 1935, Sec. 2 (set out Pet. 5-6), "The court shall sentence such person to the penitentiary • • • and shall fix the maximum term of such person's sentence only." This law did not come into effect until June 12, 1935. The offense was

alleged to have been committed "on or about April 15, 1935."

The 1935 enactment also provided (Pet. 6):

> "the board • • • shall fix the duration of his or her confinement."

At the time of the commission of the offense, if any, April 15, 1935, the statute R. R. S. 2172 (Pet. 5) provided that the court should fix the term of confinement.

Also Rem. Rev. Stat. 2281 (Pet. 4) which was repealed by Chap. 114, Laws of 1935, provided on April 15, 1935, that the court should fix a "minimum term" and also a "maximum term", each of which should be in the court's discretion, and in its discretion the "maximum might be fixed at less than the maximum provided by the law denouncing the offense." The court could fix a maximum less than 15 years under the old law, but cannot under the new. The new law also placed the fixing of the term in a ministerial board, instead of the court.

This was claimed, in the Supreme Court of Washington (R. 63) (Pet. 2) to be a void sentence under Art. 1, Sec. 10 of the United States Constitution.

This contention was denied by said court (R. 91-92) (Pet. 2).

The record and laws set out show a direct federal question, presented and refused, and the question is now one for this court.

(d) The second question presented (Pet. 8) "that all the proceedings were so violative of petitioners' fundamental rights under the 14th amendment, as to be void" is sustained by the record as follows:

(a) As to the coercing one of the petitioners for the purpose of obtaining incriminating statements, and using same: (The extracts from the record are set out in Petition 8-10, and not repeated for sake of brevity.)

Exhibit No. 2, the written statement obtained and used as evidence is found (R. 37-38).

The decision of the Supreme Court, so far as it went, on this question is set out (Pet. 10).

(b) That the prosecutor secured and used as impeachment, judgments and sentences in case No. 11045-25867, which judgments and sentences were, after being so used, held by the courts to be void, and that petitioners have been denied the right in any court to show that fact (Pet. 11).

The said judgments and sentences were founded on a charge of Attempted Grand Larceny (R. 66):

> "That on May 3, 1935, the Deputy Prosecuting Attorney of Spokane County, Washington, filed two criminal informations against the defendants, jointly; that one of the cases was brought on for trial on June 12, 1935, the said Deputy Prosecutor, one C. C. Quackenbush, representing the State of Washington • • • (R. 66) that in order to obtain a conviction the said Quackenbush • • • put before the jury in his argument false and libelous statements of and concerning the defendants • • •.
>
> "And this court (Sup. Ct. of Wash.) on Jan. 10, 1936, sustained and upheld the contention of defendants, and in said case of State *v.* Lindsey, 185 Wash. 206 held said convictions to have been illegally obtained • • •."

Said case of *State* v. *Lindsey,* is reported in 185 Wash. 206; 52 Pac. (2nd) 1246, and is in part as follows:

No. 25867 of Supreme Court. No. 11045 of Superior Court.

January 10, 1936.

> "The defendants were charged with the crime of attempt to commit the crime of grand larceny." • • •
>
> "Neither appellant took the witness stand. During the closing argument to the jury, the prosecutor said:
>
> If we want to send Elbert B. Lindsey to the penitentiary as his counsel has suggested, we have a much

greater crime that we could have charged him with than this, one that he might have been charged with and much more easily convicted; this is just a small matter • • •."

"So far as E. R. Lindsey is concerned he is so hardened in crime that there is no hope that he will ever reform."

"In a case such as this, where 'intent to defraud' is an essential element and is, necessarily, inferrable only from the facts and circumstances surrounding the transaction, the remarks of counsel, reflecting on the character of appellants was highly prejudicial."

"The judgment is reversed and the cause remanded, with instructions to grant appellants a new trial."

The sentences used for impeachment (Exhibits 3 and 5, R. 38, 40) were for a term of seven and a half years, being the maximum allowed under Grand Larceny, Attempt. The offense was alleged to have been committed prior to May 3, 1935. The petitioners were therein sentenced on July 10, 1935 (R. 38, 40). They were sentenced under Chap. 114, Laws of 1935, which came into effect on June 12, 1935, and which denied them their rights under R. R. S., Sec. 2281, as set out hereinbefore.

On November 21, 1936, the U. S. District Court at Walla Walla, Wash., in *Andrus* v. *McCauley et al.*, No. L. 1421 (opinion appended) in passing on the effect of this 1935 enactment, said:

"Mathematically the operation of Sec. 2 of the 1935 enactment inflicts a greater punishment than the law inflicted at the time the offense was committed • • •"

and

"That the enactment of 1935, so far as it attempted to be applied to the sentence and term of confinement of petitioner is *ex post facto* in effect • • •."

Is the procuring of void judgments and sentences against an accused person, and using the same for impeachment and to cast aspersions and burdens on the defendants when they

take the stand in their defense in another case, before defendants can have them set aside; and when such judgments and sentences are thereafter set aside by competent courts, and then not allowing defendants to show the invalidity and thus avoid the effect of the illegal judgments, a violation of the rights guaranteed under the 14th Amendment of "due process," and a denial of their right to "defend themselves when assailed in court by the State"!

The defendants did so offer themselves as witnesses:

(R. 18.) "Elbert B. Lindsey, called as a witness by the defense."

(R. 26.) "E. R. Lindsey called on behalf of the defense."

(R. 23.) "States exhibit No. 3, commitment of Elbert B. Lindsey received in evidence and marked." (Said commitment being for a term of seven and a half years in Case No. 11046.) (R. 38.)

(R. 32.) "States exhibit No. 5 admitted in evidence, being a commitment of E. R. Lindsey." (Said commitment being for a term of seven and a half years in case No. 11045.) (R. 40.)

The refusal to allow petitioners to show that the judgments and sentences had been held illegal, was urged by motion in arrest of judgment and motion to re-open, and to be a violation of their fundamental rights under the 14th Amendment, as fully set out in (Petition, pp. 6-10) and is referred to without repetition. This contention was denied by the Supreme Court, without opinion (R. 75, 86).

It was a denial of "due process" in that it was a denial of petitioners' fundamental rights to defend themselves when assailed, and to have their evidence go to the jury unburdened with any illegal and void aspersions. It was a denial of any trial at all.

(c) (Pet. 16.) That Elbert B. Lindsey was denied coun-

sel in violation of his rights under the VI Amendment is shown by:

(R. 19.) (During the "quizzing" by the State's prosecutor):

> "I asked three or four times for an attorney to be present so I could be represented, but I was refused."

And (R. 3.) (Statement of Facts) (R. 88, opinion of Sup. Ct.):

> "and defendant Elbert B. Lindsey objecting to proceeding with the trial by reason of the fact that he was unable to employ counsel, and that counsel had just, at that time, been appointed for him, and that he had no time to consult with counsel or prepare his case, which objection was over-ruled and exception taken by said defendant • • • and the court having ordered that the trial proceed • • •."

This contention among others was presented to the Supreme Court as a violation of the appropriate provision of the Federal Constitution, and while mentioned in the opinion (R. 89) the question under the Federal Constitution was not passed on.

(d) (Pet. 16.) That petitioners, and especially E. R. Lindsey, were tried under a statute and under allegations in respect thereto—by the instructions submitted to the jury—which allegations were not charged in the information on which the case was purported to be tried, thus depriving them of *notice* and an opportunity to defend after notice.

The facts as they appear by the record, the statutes, and the claim of Constitutional rights in respect thereto, are fully set out in (Petition, pp. 16-21) and are referred to, without repetition.

The record fully shows that petitioners were tried on facts and allegations, submitted to the jury, with which they had never been charged by information, and were not given

"Due process"; that the claim was fully presented to the Supreme Court, and by that court denied.

(e) The question of a judgment of "guilty" being entered on a verdict "which was in law a verdict of acquittal" and that instead of being sentenced, defendants are entitled to their discharge, has also been fully set out (Pet. 22-23) and the manner in which their claim under the 14th Amendment was made, and refused.

The jurisdiction in this Court is complete.

The following cases are cited as sustaining petitioners' contention that this Court has jurisdiction:

> "The Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the State court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided."
>
> *Lawrence* v. *State Tax. Com. of Mississippi*, 286 U. S. 276-282.

> "The judicial power shall extend to all Cases, in Law and in Equity, arising under this Constitution • • •."
>
> Article III, Section 2, United States Constitution.

> "The appellant insists that the circuit court has no jurisdiction of this case, because all the parties are citizens of Tennessee. We think, however, that jurisdiction exists because the case is one arising under the Constitution of the United States, the complainant insisting that under such constitution the law of the State of Tennessee, passed in 1903, is invalid, because it impairs the obligation of contract protected by that instrument."
>
> *Illinois C. R. Co.* v. *Adams*, 109 U. S. 28-35, 21 S. Ct. 451, 45 L. Ed. 410-412.

"The claim that the action of the State board of equalization in making the assessments under consideration was the action of the State, and if carried out would violate the provisions of the 14th amendment to the Constitution of the United States by taking property of the appellee without due process of law, and by failing to give it the equal protection of the laws, constitutes a federal question beyond controversy.

"How that question should be decided is another matter."

Raymond v. *Chicago Union T. Co.*, 52 L. Ed. 78-87.

"The provisions of the 14th amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. These provisions relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever by virtue of public position under a state government, deprives another party of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition; and as he acts in the name of the state, and is clothed with the State's powers, his act is that of the state."

C. B. & Q. R. R. v. *Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979.

III.

A full statement of all that is material to a consideration of this petition has been set out in the petition under statement "A", and for the sake of brevity, it is not repeated here, but is referred to and made a part hereof, as though repeated.

IV.

Specification of Errors.

Petitioners claim that the Supreme Court of the State of Washington erred in the following:

1. That the said court erred in holding that the sentences of petitioners did not violate the inhibition contained in

Sec. 10, Art. I of the Constitution of the United States, against *ex post facto* laws.

2. That the said court erred in affirming the judgment of the trial court and in not specifically passing on petitioners' contention that R. 58):

> "This trial and the procedure had thereunder and the instructions quoted above violate the IV, V, VI and XIV amendments to the Constitution of the United States."

3. That the said court erred in not passing on the question of the constitutionality of the following (Opinion, R. 89):

> "(I) The first assignment is directed to the overruling of objections to the admission in evidence of statements attributed to one of the defendants in the presence of police officers while, as it is claimed, such defendant was held in custody and the statements were made under duress, all in violation of the Constitution of the United States and of this state."

4. That the said court erred in not passing on petitioners' contention that it was a violation of the "due process" guaranteed by the 14th amendment to the Constitution of the United States, for the State to procure a conviction by means of the use of previous judgments and convictions and sentences on a felony charge, of each of petitioners, which judgments and sentences, were before the termination of the proceedings in the Supreme Court, held by the same Supreme Court to be illegal, and by the Federal courts, like judgments held to be void, and which in all substantial effect, denied petitioners the right to defend themselves when assailed, by burdening their testimony with illegal aspersions, and then by the said Supreme Court refusing to allow petitioners in any manner to show the fact that the judgments and sentences, so used by the state, were held void and illegal by competent courts.

5. That the said Supreme Court erred in not passing on the contention of petitioners' that it was a denial of due process as to them as guaranteed by the 14th Amendment to the United States Constitution, to submit to the trial jury, and in all substantial effect try petitioners on a charge not embraced in the information, and on and under a statute that required further allegations, and allegations not charged in the information; thus denying petitioners "due process" or "any process".

6. That the said Supreme Court erred in not passing on petitioners' contention, that it was a denial of "due process" under the 14th amendment to the United States Constitution, to enter a "judgment of guilty as charged" when the verdict, in law was a verdict of "acquittal" of each defendant.

7. That the said Supreme Court erred in not passing on petitioners' contention that for the State to deny to Elbert B. Lindsey at all times, in substance, an attorney to assist in his defense, was a denial of his rights under the VI and 14th Amendments to the Constitution of the United States.

V.

ARGUMENT.

The first reason urged for the granting of this writ is that the sentences of petitioners were under a law passed after the date of the alleged commission of the offense, and that the new law increased the punishment and in other respects changed the situation of petitioners to their disadvantage, and therefore the sentences are void under Art. 1, Sec. 10 of the Federal Constitution.

The date alleged for the offense was: "On or about April 15, 1935" (Pet. 2).

The new 1935 enactment took effect June 12, 1935 (Pet. 4).

The date of trial was Sept. 12, 1935; the date of sentence was Nov. 1, 1935 (Pet. 4).

The laws of the state on April 15, 1935 (R. R. S. 2281, Pet. 4) required the court to fix a "minimum and a maximum sentence."

The 1935 enactment prohibited the court from fixing any term but the maximum (Pet. 5-6).

The sentences (Pet. 4) were for a term "of not more than fifteen years." A "maximum sentence" only under the 1935 enactment.

In *Kring* vs. *Missouri*, 107 U. S. 221-226, 27 L. Ed. 506-509, this Court said:

> "No one can be criminally punished in this country, except according to a law prescribed for his government before the supposed offense was committed, and which existed as a law at that time. It would be useless to speculate upon the question whether this would be so upon the reason of the thing, because the rule exists in the form of an express written precept, the binding force of which no one can dispute. No State shall pass any *ex post facto* law is the mandate of the Constitution of the United States."

The question of the effect of abolishing the former law which provided that the court "shall fix a minimum," etc., was brought up in a "forgery" case, to which the said Sec. 2281 applied, as well as to "larceny" involved in this case, and the effect of the said Chap. 114, Laws of 1935 of Washington, reviewed, by Kavanah, Judge, in the case of *Andrus* v. *McCauley et al.*, in the U. S. District Court, at Walla Walla, Wash. (A full copy of Judge Cavanah's opinion is appended hereto), and therein he said:

> "Mathematically the operation of Sec. 2 of the 1935 enactment inflicts a greater punishment than the law inflicted at the time the offense was committed • • •." and

"that the enactment of 1935, so far as it attempted to be applied to the sentence and term of confinement of petitioner is *ex post facto* in effect • • •."

Citing, *Ex Parte Medley*, 134 U. S. 160, 10 Sup. Ct. 384, 33 L. Ed. 835.

R. R. S. 2281, which was repealed on June 12, 1935, contained a provision that the court should exercise its "discretion" in fixing the sentence. It was a statutory right to have the court so fix the sentence, a maximum and a minimum.

The 1935 enactment (Pet. 5-7) takes this power away from the court or judicial authority and places it in a "ministerial board."

"if it (the law) substitutes the discretion of the board of prison directors for the statutory right, then we must hold the law *ex post facto*, even though the board of prison directors • • • might deal more leniently with the convict."

Ex Parte Lee, 171 Pac. 958 (Cal).

The 1935 enactment (Pet. 7) (Sec. 4) provides (which is a new provision in this state):

"The board • • • shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion • • •."

"From and after the suspension, cancellation or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term."

In *State* v. *Tyree*, 78 Pac. 525, 3 Ann. Cases 1020 (Kan.), in passing on a similar statute, said:

"There is another provision of Sec. 3 of the Act of 1903 which might result to the material and substantial disadvantage of the appellant. It is there provided

that if a prisoner violate a parole he shall be arrested and compelled to serve out the unexpired term of the maximum imprisonment, and the time from the date of the declared delinquency to the date of his arrest shall not be counted as any portion or part of the time served. Other provisions of the Act authorize the prison board to make rules and stipulate conditions in the parole, a violation of which, although not a violation of law, would subject the paroled prisoner to rearrest and reimprisonment. The time intervening the declared delinquency and the arrest not being deducted from the maximum time, the period within which appellant might obtain his liberty is extended beyond the maximum time for which he could have been sentenced; this excess of time depending upon the activity or negligence of the officers whose duty it was to issue a warrant or execute the same for his arrest. For these reasons the sentence imposed was *ex post facto* and should be set aside."

The Supreme Court of the State (Pet. 2) denied the challenge of petitioners that the sentences are *ex post facto*.

The District Court of the United States, and other courts, including this court, have always held such sentences to be *ex post facto* and void. Defendants were denied their rights under Art. 1, Sec. 10 of the Federal Constitution.

The second contention raised (Pet. 8) is that there was such a denial of fundamental rights, as guaranteed by the United States Constitution, V, VI, and XIV amendments, as to make any judgment and conviction rendered void, as set out:

(a) (Pet. 8). By unlawfully coercing, and compelling him to give evidence against himself, at a time when the State was conducting the inquisition, and when said defendant, Elbert B. Lindsey, demanded and was denied an attorney for his defense.

(b) (Pet. 11). By the State securing convictions and sentences against each of petitioners, which were illegal and void, and which have been so declared since by courts of competent jurisdiction; that when these petitioners took the witness stand in their own defense—being tried before they could have the illegal convictions so declared by the appellate court—that the State used said convictions and sentences to unlawfully burden and cast aspersions on petitioners' testimony; and then by the State denying petitioners the right to show that the convictions have been declared illegal and void; thus denying petitioners in all substantial effect the right to defend themselves when assailed.

(c) (Pet. 16). By denying petitioner Elbert B. Lindsey counsel when put through an inquisitorial proceeding by the State, he so demanding counsel; and by in all substantial effect denying him counsel at the trial, by not allowing him to consult with the counsel, just at that time appointed for him, and by not allowing him counsel to prepare his defense, he being at all times confined in jail.

(d) By charging the trial jury, and in effect trying petitioners, and especially E. R. Lindsey, on a charge concerning which no information had ever been filed, and none of the legal formalities complied with; thus giving petitioners no *notice*.

(e) (Pet. 22). By charging petitioners in the information, jointly, under one state of facts; that after all parties had rested submitting the case to the jury, as to E. R. Lindsey on a state of facts and law not charged, and which required, if charged additional allegations; by putting the case to the jury as to each defendant on several statutes—one not charged—and charging the jury as to each defendant severally, on facts several as to acts, several as to

time, several as to place, and several as to law, and then charging the jury if they found one defendant guilty under one charge and the other guilty under the other charge, *to bring in a joint verdict of guilty as charged in the information,* which in law was a verdict as to neither, and then entering on said verdict a judgment of "guilty as charged in the information" as to each defendant; when the court had already charged the jury to "find E. R. Lindsey not guilty of the acts charged in the information."

These matters were all raised by appropriate claims of constitutional rights as set out in the petition, and all ignored and a decision as to the constitutional rights refused by the State Supreme Court.

The following decisions would seem to be applicable:

On claim (a) (Pet. 8) (Assignment of error No. 3).

The laws of the State of Washington (Pierce Code #9214, R. R. S. Sec. —) provide:

> "and any person accused of crime in this state • • • may in the examination or trial of the cause, offer himself or herself, as a witness in his or her own behalf, and shall be allowed to testify as other witnesses in such case, and when accused shall so testify, he or she shall be subject to all the rules of law relating to cross-examination of other witnesses; Provided, That nothing in this Code shall be construed to compel an accused person to offer himself or herself as a witness in such case."

The salient facts are set out in Petition pp. 8-10.

The Constitution of the United States, Art. V, provides:

> "No person • • • shall be compelled in any criminal case to be a witness against himself."

The Supreme Court of the State of Washington, in *State* v. *Miller,* 61 Wash. 125; — Pac. —, condemned this practice, as to other persons in this state, and petitioners are

entitled under the XIV Amendment to "the equal protection of the laws." And the court there said:

> "The Prosecuting Attorney was there for a purpose. The Evident purpose was to obtain a confession from appellant. • • • The effect of solitary confinement on the mind of a person charged with crime may be imagined. It is a well-known psychological fact that men and women have frequently confessed to crimes which they did not commit."
>
> "Neither policemen, detectives nor jailors are clothed in this country with inquisitorial powers."
>
> "It is true that some of the laws of Spain have been ingrafted in ours • • • such as the dungeon. These belong to the age of bigotry, intolerance and suspicion, and have no place in our civilization. Any attempt to revive them, even in a mild form, ought to call for the execration of the people, and a severe condemnation of the law. • • • Every man is innocent until proven guilty. • • • This • • • rule has been reversed by the process and practices shown by the record."

The conviction was set aside in that case; is it "equal protection of the laws" to allow such practices to be used against petitioners? It surely is not.

This Court in *Brown* v. *Mississippi*, decided Feb. 17, 1936, Supreme Court Advance Opinions of March 1, 1935, p. 427 said:

> "But the question of the right of the State to withdraw the privilege against self-incrimination, is not involved here. The compulsion to which the quoted statements refer is that of the process of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to extort a confession is a different matter."
>
> "The rack and torture chamber may not be substituted for the witness stand."

See also:

Bram v. *U. S.*, 168 U. S. 532, 18 S. Ct. 183, 42 L. Ed. 568;

Wan v. *U. S.*, 266 U. S. 1, 69 L. Ed. 1.

On claim (b) (Pet. 11).

The previous convictions and sentences, of each of the petitioners found in the Record at pp. 38-41, in case No. 11045, as shown by the number thereon, were introduced in evidence on Sept. 12-13, 1935. The same convictions were held to be illegal and reversed by the Supreme Court of this State in the case of *State* v. *Lindsey*, found at 185 Washington reports, at page 206; 52 Pac. (2d) 1246, of date January 10, 1936.

Such sentences were also held void by the U. S. District Court, on Nov. 21, 1936. *Andrus* v. *McCauley* (opinion appended).

In the case of *State* v. *Harrass*, 22 Wash. 57; 60 Pac. 58 which was a case wherein defendant wished to call a witness who had been convicted of perjury, and his case was on appeal. The witness was not allowed to testify. Soon thereafter the conviction for perjury was set aside. And the Supreme Court said:

(After holding that it was not error for the trial court to reject the witness) (A condition on all fours with this case).

> "But we cannot overlook the fact that appellant has been deprived of the benefit of the testimony of a witness, not because of any act for which he is responsible, but because of the illegal judgment of conviction against such witness. Manifestly he has not had the benefit of those rights which are vouchsafed to him by the constitution, among which is the right to have witnesses examined in his behalf. He has committed no act by which the right has become forfeited. The error was not of his making • • •. Here is a condition never contemplated by the legislature. If the defendant has been deprived of the right to make a defense through no

> fault or neglect of his own, it would be a shame and a reproach to the law to hold him accountable for the laws mistake. The case • • • involves the larger question of a defendant's right to have witnesses examined in his behalf. It involves the constitutional right to a fair trial. No duty which the court owes society can rise above that of preserving inviolate those principles which make effective the constitutional guaranty of a fair trial • • •.
>
> It is not enough that the record should satisfy us of the actual guilt of the prisoner.
>
> The duty is upon the state to demonstrate his guilt by legal evidence, upon a fair trial, where no constitutional or legal right is denied him."

In the recent case of *State* v. *Navone*, 186 Wash. Rep. 532-539, 52 Pac. (2d) 1208, the Supreme Court of this State in speaking of the effect of illegal aspersions against the character of accused, said:

> "The only question before the jury was the question of intent; and upon that question, whether or not the appellants were men of integrity and honesty and whether or not they testified truthfully, bore with peculiar force. If, in fact, they were men of good character, their testimony would have weight; but if of bad character, that, coupled with their interest in the result, would tend to wholly destroy their credibility."
> • • •
>
> "This question of character bears with peculiar force upon the issue of intent, and the character of appellants having been destroyed with a single blow, the jury • • • must necessarily have been greatly influenced thereby in determining the issue of intent. The ordinary direction to disregard could not restore the minds of the jurors to that fair and impartial state which the law requires."

In the two cases last cited the Supreme Court of this State safeguarded the interests of defendants and awarded a new trial.

It is an open denial of "the equal protection of the laws" to deny petitioners the same protection. They are entitled to this under the 14th amendment.

> "It was alleged that plaintiff in error was clearly guilty and therefore the improper cross-examination and incompetent evidence did him no injury.
>
> That was the issue for the jury to try, and the law does not provide one method for trying innocent persons and another for trying guilty persons. The plaintiff in error had a right to trial by jury, on competent evidence, and to have his witnesses appear without any illegal disparagement of his credibility. The question is not what, with the aspersions against the witness wrongfully appearing in the record, we may think of the guilt or innocence of the plaintiff in error, but what the jury would have done if the case had been submitted to them without those aspersions.
>
> The rule that a judgment will not be reversed where the evidence clearly shows the defendant's guilt, does not justify a total disregard of the rights of a prisoner upon his trial for an alleged offense. He still has a right to be tried by the law of the land, and a conviction secured by a trial in total disregard of the law cannot be sustained."
>
> *People* v. *Newman*, 103 N.E. 589-591 (Ill.).

> "Whenever a party seeks to avail himself of a former judgment fraudulently obtained, the opposing party may show the fraud and thus avoid the judgment. In criminal issues this is settled law."
>
> *U. S.* v. *Bradford*, 148 Fed. 413-427;
>
> *Wharton Criminal evidence* (9th Ed.) Sec. 595.

In *McClatchy* v. *State* (Cal.), 51 Pac. 699, the Supreme Court of that State said:

> "That the result of this action of the court in thus requiring petitioner, in effect to submit his defense upon the evidence of the people, was, in substance and effect to deprive petitioner of the right to be heard in his defense, is, we think obvious."

"It was error, certainly, but it was more than that. It was a transgression of a fundamental right guaranteed to every citizen charged with an offense • • • of being heard before he is condemned to suffer injury. Any departure from those recognized and established requirements of law however apparent adherence to mere form in method of procedure, which has the effect to deprive one of a constitutional right, is as much an excess of jurisdiction, as where there exists an inceptive lack of the power.

The substance and not the shadow determines the validity of the exercise of power."

Citing: *Cable Co.* v. *Adams*, 155 U. S. 689-698; 14 S. Ct. 258-260.

Claim (c) (Pet. 16).

(R. 19) (Pet. 9.) "Elbert B. Lindsey" "I asked three or four times for an attorney to be present so I could be represented, but I was refused."

(R. 3.) "Elbert B. Lindsey objected to going to trial because an attorney had just, at that time been appointed for him, and he had no time to consult with counsel or prepare his case."

"The state may not deny to the accused the aid of counsel."

Brown v. *Mississippi*, U. S. S. Ct. Adv. Dec., March 1, p. 427;

Citing *Powell* v. *Alabama*, 287 U. S. 45-53; 53 S. Ct. 55.

Wherein it was said:

"Where a person without legal knowledge is confined in jail and absent from his friends, without the aid of legal advice, or the means of investigating the charge against him, it is impossible to conceive of a fair trial where he is compelled to conduct his case in court without the aid of counsel. Such trial is not far removed from an ex parte proceeding • • • and state decisions which refer to the matter invariably recognize the right to the aid of counsel as fundamental in character."

Claim (d) (Pet. 16). That E. R. Lindsey was tried on a charge not embraced in any information filed; as well as the same charge being in the instructions submitted as to Elbert B. Lindsey, it being a joint trial, and that each petitioner was tried on a separate charge, several as to all its elements, and as to the law, and a joint verdict rendered thereon; which was a verdict as to neither, but was in effect a verdict of acquittal.

The information filed (R. 1) (Pet. 2) was a joint information, under R. R. S. 2601 sub-div. 2 (R. 44) (Pet. 3) in effect larceny by means of a false token.

The sufficiency of the evidence was challenged by each of petitioners, at the close of all the evidence (R. 35-36) (Pet. 17).

The court then charged the jury (R. 44) (Pet. 17-18) under R. R. S. 2601-2:

> "Any person who shall with intent to defraud make, or draw or utter, or deliver to another person and check, or draft, on a bank or other depository for the payment of money, • • • etc."

And charged the jury as to E. R. Lindsey (R. 45) (Pet. 19) under those elements viz:

1. That E. R. Lindsey drew the check.
2. That he delivered it, etc., and
3. Charged the jury as a matter of law that it was drawn on a bank or depository for the payment of money—specifically, "a bank" "the bank on which it was drawn."

There was no such charge in any information.

The purported check *was not drawn on a bank* (R. 1).

A trust company is not *prima facie* "a depository for the payment of money." And there is no charge that it was such.

> "The offense is complete only when the check or draft is made or drawn, etc., on any bank or depository

for the payment of money or its equivalent • • •."
State v. *Yarboro*, 140 S. E. 216-218.

This Court said in *Powell* v. *Alabama*, 287 U. S. 45:

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to an enforcible judgment, and that they, together with a legally constituted tribunal having jurisdiction of the case, constitute the basic elements of the Constitutional requirement of 'due process of law'."

In *Gavieres* v. *U. S.*, 220 U. S. 338-342, 31 S. Ct. 421, 55 L. Ed. 489-490, this Court said:

> "A single act may be an offense against two statutes; if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment for the other."
>
> "Applying this principle, it is apparent that evidence sufficient for conviction under the first charge would not have convicted under the second indictment. In the second case it was necessary to aver and prove *the insult to a public official or agent.* • • •
>
> "Without such charge and proof there could have been no conviction under the second case."

Likewise without an averment in the information:

"That E. R. Lindsey drew the purported check:

"That he delivered it, and

"That it was drawn on a bank or depository for the payment of money." *Which averments were entirely lacking,* E. R. Lindsey could not have been convicted under the charge in the instructions to the jury (R. 45) (Pet. 19-20), and (R. 45) (Pet. 20) (Instruction):

> "If, on the other hand, the state has failed to prove each of the foregoing elements to your satisfaction, beyond a reasonable doubt, then it would be your duty to acquit the defendant, E. R. Lindsey."

The verdict in law was an acquittal of E. R. Lindsey.

And Elbert B. Lindsey could not be convicted, on a joint charge, with such an instruction before the jury.

> "The indictment charges both appellants in precise terms with the commission of a joint offense. The act charged was a joint act. The indictment was faultless on its face; it contained all the requisites of a good pleading, but of what avail was it to the appellants; they met it in the usual form; and having closed their defense, the jury were instructed that the plaintiffs in error might be found guilty of the joint charge of which they were accused if the evidence only showed that they had separately been guilty of it, although it did not show that they were both together engaged in the same act.
>
> In giving this instruction there was error. It was equivalent to saying to the jury "you may convict them of the joint offense alleged against them, although the proof satisfies you that they were not guilty of it, provided, it convinces you that each one separately has committed an offense of a like nature. If this were the law, it would be of little use to require an indictment. In fact it could not be said with much propriety, upon the supposition that there was proof to make the charge of the court applicable, that plaintiffs in error were convicted upon any indictment. If the proof only showed that they had been separately engaged in different acts, it by no means supported the indictment, and the verdict was wholly without proof to sustain it."
>
> *Stephens* v. *State,* 14 Ohio 386-389.

Such is exactly the situation in this case.

Claim (e) (Pet. 22). That the verdict was a verdict of acquittal.

In *McGehee* v. *State,* 58 Ala. 360, it was so held.

> "If it had been averred in this indictment that the two defendants had committed separate distinct offenses at different times, neither being present nor participating in the offense of the other, a demurrer to the

indictment would have lain, notwithstanding the two offenses charged are identical in character. This is on the well defined ground that on such trial it would be necessary to offer proof of two independent transactions.

On like principles, if two offenders are charged in one indictment, which is faultless in form, and it be developed in the evidence that the two defendants committed their several offenses at different times or place • • • in other words that they are not guilty of the one and same offense, the proof does not sustain the indictment.

In the present case, according to the recitals in the pleading—each defendant was equally guilty, but they did not participate in one and the same offense. This was not shown until the evidence was given to the jury. At that stage of the trial, each defendant was placed in legal jeopardy and was entitled to have a verdict of the jury on the question of his guilt • • •."

"The defendants having been placed in jeopardy, and being entitled to a verdict of acquittal on the proof made, must be allowed the benefit of the verdict that they were entitled to, and cannot be again tried for the same offense."

Claim II. That the state cannot contrive such a conviction as shown by this record.

In *Brown* v. *Mississippi*, found in the Supreme Court Advance Sheet of March 1, 1936, at page 427, this Court said:

"The state may not deprive the accused of the aid of counsel."

"Nor may a state through the action of its officers contrive a conviction through the pretense of a trial which in truth if "but a means of depriving a defendant of his liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured."

"The due process clause requires "that state action whether through one agency or another, shall be consistent with the fundamental principles of liberty and

justice, which lie at the base of all our civil and political institutions."

And in the same case the Honorable Chief Justice, denominated such a trial as "a solemn farce."

Summary of the Argument.

A.

The decision of the Supreme Court of the State of Washington, under the facts as herein set out, wherein the said court held that the law under which petitioners were sentenced, was not *ex post facto*, and in contravention of Art. 1, Sec. 10 of the United States Constitution, is directly contrary to the decisions of this Court, wherein it has been invariably held that such laws are *ex post facto*.

And the said decision is contrary to the decisions of this Court, of the State courts, cited, as well as contrary to its own decisions (which are not overruled) but which are ignored.

The identical law in question has recently been passed on and held *ex post facto* in *Andrus* v. *McCauley* (decision appended).

And to hold that the State can charge defendants under one state of facts in an information, and then submit to the trial jury as to one defendant an entirely different state of facts, not charged, this trying two defendants in one trial, on several charges, and then sustaining a joint verdict, is a direct denial of "due process".

And to use illegal convictions and void sentences for the purpose of casting aspersions on the testimony of defendants when they undertake to defend themselves, and then to deny defendants all opportunity of showing the fact of the invalidity of the judgments used for conviction, when such fact has already been judicially declared by competent courts, is in all substantial effect to deny defendants a right

to defend at all; it is but another method of striking their testimony, but even worse, because it affects their character and puts the impression before the jury wrongfully, that they have theretofore been convicted of crime, when such fact does not exist.

The State started out in this trial to use every method in their power to deny these petitioners a right to defend themselves, and with the intention to convict them somehow, even to the extent of trying them for an offense with which they had no *notice* and with which they had never been charged. Such methods belong to the dark ages, but have no place in a civilized country. A defendant has a right to be tried as other citizens are tried, and in accordance with the principles of law, which are the result of centuries of experience, and have become fundamental.

The petitioners made claim to their rights under the Federal Constitution before their state courts; those courts denied the challenge, and refused to apply the corrective; refused to even consider the constitutional questions, and evaded and ignored them.

Conclusion.

It is, therefore, respectfully submitted, that this case is one calling for the exercise by this Court of its supervisory powers, in order that it may review the final judgment of the court of last resort of the State of Washington, the said Supreme Court, and correct the errors therein made, and protect the petitioners in their rights, privileges and immunities granted to them by the Constitution of the United States, and that to such an end a writ of certiorari shall be granted and this Court should review the decision of the said Supreme Court of the State of Washington and finally reverse it.

ELBERT B. LINDSEY,
Pro se.

E. R. LINDSEY,
Pro se.

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936.

No. 660.

ELBERT B. LINDSEY AND E. R. LINDSEY, *Petitioners*,

vs.

STATE OF WASHINGTON, *Respondent*.

On Petition for Writ of Certiorari.

Appendix 1 to brief, being a copy of Chapter 114, Laws of Washington, 1935, p. 308, which took effect at midnight June 12, 1935, being the law under which petitioners were sentenced and which it is claimed is *ex post facto* as to petitioners.

Chapter 114 of Laws of Washington for 1935.

Be it enacted by the Legislature of the State of Washington:

Rem. Rev. Stat. Sec. 10249-1.

SECTION 1. There is hereby created a board of prison, terms and paroles to administer the provisions of this act. The functions, powers, duties and limitations of this body and the qualifications and the tenure of office of its members will be as hereinafter set forth.

Rem. Rev. Stat. Sec. 10249-2.

SECTION 2. When a person is convicted of any felony except treason, murder in the first degree, carnal knowledge of a child under ten years, or of being a habitual criminal within the meaning of the statute which provides for life imprisonment for such habitual criminals, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only.

The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; if the law does not provide a maximum term for the crime

for which such person was convicted, the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment; provided, however, that in any case where such maximum term is fixed by the court that maximum term shall be fixed at not less than twenty (20) years.

If the sentence of a person convicted is not suspended by the court, it is hereby made the duty of the superintendent of the penitentiary and the superintendent of the reformatory to receive such person, if committed to his respective institution, and to imprison him or her until released under the provisions of this act or through the action of the governor.

After the admission of such convicted person to the penitentiary or reformatory, as the case may be, it shall be the duty of the board of prison, terms and paroles to obtain from the sentencing judge and the prosecuting attorney, a statement of all the facts concerning such convicted person's crime and any other information of which they may be possessed relative to such convicted person, and it shall be the duty of the sentencing judge and the prosecuting attorney to furnish the board of prison, terms and paroles with such information. It will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance what, in their judgment, should be the duration of such convicted person's imprisonment.

Within six months after the admission of such convicted person to the penitentiary or the reformatory, as the case may be, the board of prison, terms and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

When a convicted person appeals from his or her conviction and is at liberty on bond pending the determination of his or her appeal by the supreme Court, credit on his or her sentence will begin from the date of the remittitur. In all other cases, credit on a sentence will begin from the date the judgment and sentence is signed by the court.

In case any convicted person undergoing sentence in the penitentiary or the reformatory commits any infraction of the rules and regulations of the penitentiary or reformatory, as the case may be, the board of prison, terms and paroles may revoke any order theretofore made determining the length of the time such convicted person shall be imprisoned, and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted, or the maximum fixed by the court. Such revocation and redetermination shall not be had except upon a hearing upon the question of the infraction of the rules charged to such convicted person before the board of prison, terms and paroles. At such hearing, the convicted person, unless outside the walls of the penitentiary or reformatory, as an escapee and fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf.

Any convicted person undergoing sentence in the penitentiary or the reformatory, not sooner released under the provisions of this section, shall, in accordance with the provisions of existing law, be discharged from custody on serving the maximum punishment provided by law for the offense for which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term.

The following limitations will be placed on the board of prison, terms and paroles with regard to fixing the duration of confinement in certain cases, notwithstanding any provision of the law specifying a lesser sentence, to-wit:

(a) For a person not previously convicted of a felony but armed with a deadly weapon either at the time of the commission of his or her offense, or concealed deadly weapon at the time of his or her arrest, the duration of such person's confinement shall not be fixed at less than five years.

(b) For a person previously convicted of a felony either in this state or elsewhere and who was armed with a deadly weapon at the time of the commission of his or her offense, or a concealed deadly weapon at the time of his or her arrest, the duration of such person's confinement shall not be fixed at less than seven and a half years.

The words "deadly weapon" as used in this section are hereby defined to include any instrument known as blackjack, sling shot, billy, sand-club, sand bag, metal knuckles, and dirk, dagger, pistol, revolver or any other firearms, and knife having a blade longer than three (3) inches, any razor with an unguarded blade and any metal bar or pipe used or intended to be used as a club, and explosive, and any weapon containing poisonous or injurious gas; Provided further, that any inmate of the reformatory who is under the age of twenty-one (21) years, at the time of commitment, may be paroled by the board without regard to the limitations set forth in this section.

The board of prison, terms and paroles shall require of every able bodied convicted person imprisoned in the penitentiary or reformatory as many hours of faithful labor in each and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the institution in which he or she is confined.

Every prisoner who has a favorable record of conduct at the penitentiary or the reformatory, as the case may be, or the laws of the State, and who performs in a faithful, dilligent, industrious, orderly and peaceful manner the work, duties and tasks assigned to him to the satisfaction of the superintendent of the penitentiary or the reformatory, as the case may be, and in whose behalf the superintendent of the penitentiary or reformatory shall file a report certifying that his or her conduct and work has been meritorious and recommending allowance of time credits to him or her, shall upon, but not until, the adoption of such recommendation by the board of prison, terms and paroles, be allowed time credit reduction from the term of imprisonment fixed by the board of prison, terms and paroles.

(c) Any person who shall have been convicted of embezzling funds from any institution of public deposit of which he was an officer or stockholder such person's confinement shall not be fixed at less than five years.

Rem. Rev. Stat. Sec. 10249-3.

SECTION 3. To assist in fixing the duration of a convicted person's term of confinement, prescribing treatment for such person while in confinement and supervising or regu-

lating his or her activities while on parole, it shall not only be the duty of the board of prison, terms and paroles to thoroughly inform itself as to the facts of such convicted person's crime but also to inform itself as thoroughly as possible as to such convict as a personality. The board of prison, terms and paroles, must, therefore, adopt and apply an effective technique, of investigation to develop information for that purpose.

Rem. Rev. Stat. Sec. 10249-4.

SECTION 4. The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or reformtory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him or her by the board of prison, terms and paroles, less time credits for good behavior and dilligence for work as provided by this board; provided, that in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.

The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion.

The board of prison, terms and paroles may impose as a condition of a parole granted a convicted person that all or a portion of his or her credits earned, or to be earned, shall be forfeited in the event that such convicted person shall break his or her parole, or violate any law of the State or rule or regulation of the penitentiary or reformatory, as the case may be, or the board of prison, terms and paroles.

Such forfeiture of credits shall not be had except upon a hearing upon the question of such violation and upon the finding of the board of prison, terms and paroles that such convicted person was guilty thereof, which adjudication shall be final. At such hearing such convicted person unless outside the walls of the penitentiary or reformatory, as the case may be, as an escapee and a fugitive from justice,

shall be present and entitled to be heard and present evidence and witnesses in his or her behalf.

The written order of the board of prison, terms and paroles, bearing the seal of that body, shall be sufficient warrant for all officers named in this section to take into custody any convicted person who may be on parole and retain such person in his custody until arrangements can be made by the board of prison, terms and paroles for his or her return to the institution from which he or she was paroled.

It is hereby made the duty of all chiefs of police, marshals of cities and villages, sheriffs of counties, and all police, prison and peace officers and constables to execute any such order in the same manner as any ordinary criminal process.

The board of prison, terms and paroles shall cause a complete record to be kept of every prisoner released on parole. Such record shall be organized in accordance with the most modern methods of filing and indexing so that there will be always immediately available complete information about each such prisoner. The board of prison, terms and paroles may make rules as to the privacy of such records and their use by others than the board of prison, terms and paroles and its staff.

The superintendent of the penitentiary and the reformatory and all officers and employees thereof and all other public officials shall at all times cooperate with the board of prison, terms and paroles and shall furnish to such board, its officers and employees such information as shall be necessary to enable it to perform its functions, and such superintendents and other employees shall at all times give the members of such board, its officers and employees free access to all prisoners confined to in the penal institutions of this state.

It is understood that no provision of this act shall limit or circumscribe the powers of the governor of the state to commute the sentence of, or grant a parole to, any convicted person, and the governor is hereby authorized to cancel and revoke the parole granted to any convicted person by the board of prison, terms and paroles. The written order of the governor of the state cancelling or revoking such parole shall have the same force and effect and be ex-

ecuted in like manner as any order of the board of prison, terms and paroles.

From and after the suspension, cancellation or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term.

The board of prison, terms and paroles shall make all necessary rules and regulations to carry out the provisions of this act not inconsistent therewith, and may provide the forms for all documents necessary therefor.

The provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the penitentiary or the reformatory, to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all the inmates thereof.

Rem. Rev. Stat. Sec. 10249-5.

SECTION 5. Whenever in its judgment the best interests of the state or the welfare of the prisoner confined in any penal institution shall be better served by his or her transfer to another institution the board of prison, terms and paroles is authorized to order and effect such transfer.

The board of prison, terms and paroles shall direct the transportation of convicted persons to the penitentiary and the reformatory and is hereby vested with authority to employ necessary persons for such purpose and to utilize the services of such persons for the supervision of convicted persons on parole whenever possible.

Rem. Rev. Stat. Sec. 10249-6.

SECTION 6. Whenever the sentence of a convicted person to the penitentiary or reformatory is suspended by the court under authority of Section 2280 of Remington's Compiled Statutes, the board of prison, terms and paroles will assume and undertake the supervision of such person during the period of such suspension or until such sentence is terminated by the governor. The board of prison, terms and paroles will promulgate rules and regulations for the conduct of such person during the time the suspension of his or her sentence is in effect.

Whenever in the opinion of the board of prison, terms and paroles the suspension granted by the court under the provisions of Section 2281 of Remington's Compiled Statutes should be revoked, the said board of prison, terms and paroles shall notify both the prosecuting attorney and the presiding judge of the Superior Court for the county wherein the sentence was suspended, to the end that appropriate action may be taken in the premises. If an order of court is made revoking the suspension of a sentence, the convicted person shall be forthwith admitted to the penitentiary or the reformatory, as the case may be, and the board of prison, terms and paroles shall thereafter fix the duration of such person's confinement in the manner provided for by Section 2 of this act.

SECTION 7. It shall be the duty of the board of prison, terms and paroles, when requested by the governor, to pass on the representations made in support of applications for pardon or the restoration of civil rights for convicted persons and to make recommendation thereon to the governor.

It will also be the duty of the board of prison, terms and paroles to exercise supervision over such convicted persons as shall have been conditionally pardoned by the governor, to the end that such persons shall faithfully comply with the condition of such pardons.

SECTION 8. (Provides for the appointment, salaries and tenure of office of the members of the board.)

SECTION 9. Sections 2278, 2281, 2282, 2195, 10247, 10248, 10249, 10238, 10239, 10803, 10280-6, 10280-10, 10280-11, 10280-12, 10280-15, 10280-16, 10237-1 and 10237-2, of Remington's Revised Statutes of Washington, be, and the same are hereby repealed.

Passed by the House March 8, 1935.
Passed by the Senate March 6, 1935.
Approved by the Governor March 20, 1935.

All acts passed by the session, approved by the governor, take effect ninety days after adjournment, or 12 o'clock midnight, June 12, 1935, except relief bills, appropriation bills and other acts declaring an emergency.

ERNEST E. HUTCHINSON,
Secretary of State.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1936.

No. 660.

Elbert B. Lindsey and E. R. Lindsey, *Petitioners*,

v.

State of Washington, *Respondent*.

On Petition for Writ of Certiorari.

Appendix 2, to brief, being a copy of the opinion rendered by Cavanah, District Judge, on November 21, 1936, in the case of *Andrus* v. *McCauley et al.*, No. L. 1421, in the United States District Court for the Eastern District of Washington, Southern Division, at Walla Walla, Washington, wherein it was held that Chap. 114, Laws of Washington, 1935, was ex post facto, and granted a writ of habeas corpus, on facts identical with those in the case at bar.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

No. L. 1421.

Ray Andrus, Inmate No. 16154, Washington State Penitentiary, Walla Walla, Washington,

vs.

J. M. McCauley, Warden, Washington State Penitentiary, Walla Walla, Washington; Louis F. Bunge, Thomas B. Waters, W. J. Danley, Members of Parole Board, Olympia, Washington.

November 21, 1936.

E. D. Phelan, 1810-11 Smith Tower, Seattle, Washington, Attorney for petitioner.

J. H. Hamilton, Attorney General for the State of Washington, Olympia, Wash., Attorney for defendants.

Cavanah, District Judge:

The petitioner has filed an amended petition for a writ of habeas corpus since his original petition was disposed of by

the court, and in which he alleges additional facts. In the opinion of the court filed on August 3, 1936, the conclusion was reached that there was not sufficient facts or reasons alleged in the original petition to warrant the issuance of the writ and therefore the petition was dismissed. After considering the amended petition the Court entered an order for the Warden of the Penitentiary of the State of Washington to show cause on October 8, 1936, why a writ of habeas corpus should not issue.

The facts alleged in the amended petition are the same as set forth in the original petition with the additional allegations that at the time of the sentence of the petitioner there was in force Section 2281 of the statutes of Washington, known as "The Indeterminate Sentence Law," which provides that "Where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than 6 months nor more than 5 years," and that had his trial been prior to June 12, 1935, on a crime committed prior to May 17, 1935, it would have been the duty of the court to fix the indeterminate sentence to consist of a definite minimum as well as a definite maximum, the former to be not less than six months, nor more than five years, and the length of both in the discretion of the court, and that he was sentenced by punishment in excess of that annexed to the crime at the time of its commission, and which was unauthorized by law, and further he alleges that he was deprived of the right of restoration of citizenship which alters his situation to his disadvantage, for at the time of the commission of the crime the right of restoration of citizenship was not in the governor, while under the enactment of 1935 it is now vested in the governor of the State.

The Warden answered the petition and alleges that the petitioner was convicted of forgery in the first degree in the State court and sentenced to a term of not more than 20 years in the State Penitentiary on June 18, 1935; that thereafter on September 16, 1935, in accordance with the provisions of Section 2, Chap. 114, laws of Washington for 1935 the sentencing judge and the prosecuting attorney of King County furnished to the Board of Prison, Terms and Paroles of the State a statement of all the facts concerning petitioner's conviction, and in which the term recommended

by the sentencing judge was 2 years. It further appears from the answer that the Board under authority contained in Section 2, Chap. 114, laws of 1935, fixed the minimum duration of the sentence which petitioner should receive at not less than 3 years; that neither the records of the Supreme Court nor the Prosecuting Attorney's office of King County show that any application for a writ of habeas corpus or for any other relief has been filed by petitioner.

The facts were stipulated and it appears therefrom that the petitioner was on May 17, 1935, charged with the commission of forgery in the first degree by the issuance of checks on April 20, 1935, and the judgment and sentence was entered on June 18, 1935, for a term of not more than 20 years; that Chapter 114 of the laws of 1935 went into effect on June 12, 1935; that section 2281 of the statutes of the State was repealed by chapter 114, but was in effect at all times prior thereto, and that section 2583 of the statutes of the state was not repealed by chapter 114.

The petitioner now alleges the same contention presented by him on his original petition that he was unlawfully deprived of his liberty for the reason that the enactment of 1935 concerning the power of the Board of Prison, Terms and Paroles to fix the duration of the term of his imprisonment and change the procedure as to the restoration of his citizenship is an ex post facto law in violation of both state and Federal Constitutions, and asserts that at the time his original petition was presented to the court attention was not called to the existence of section 2281, which was in force at the time the crime was committed; and which required a minimum sentence of not less than six months nor more than five years, and as that section was repealed by chapter 114 under which his sentence was pronounced, the court could no longer impose a minimum sentence. Stress is further made that under section 2281 the minimum must be fixed by the court, and therefore after considering that section with section 2583 and section 2 chapter 114 of the 1935 enactment the manner and extent of the punishment imposed for the crime here charged was changed by the enactment of the law of 1935 to his disadvantage.

These provisions of the statutes read: (Sec. 2281, Sec. 2583 and Sec. 2, Chap. 114, session laws of 1935 set out in full.)

Rem. Rev. Stat., Sec. 2281 (Indeterminate Sentences. #29)

"Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state penitentiary, or in the Washington State Reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and when no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment."

Rem. Rev. Stat., Sec. 2583. Forgery—First Degree. #331.

"Every person who, with intent to defraud, shall forge any writing or instrument by which any claim, privilege, right, obligation or authority, or any right or title to property, real or personal, is or purports to be, or upon the happening of some future event may be, evidenced, created, acknowledged, transferred, increased, diminished, encumbered, defeated, discharged or affected, or any request for the payment of money or delivery of property or any assurance of money or property, or any writing or instrument for the identification of any person, or any public record or paper on file in any public office, or any certified or authenticated copy of such record or paper, or any entry in any public or private record of account, or any judgment, decree, order, mandate, return, writ or process of any court, tribunal, judge, justice of the peace, commissioner or magistrate, or the official return or report of, or a license issued by, any public officer, or any pleading, demurrer, motion, affidavit, appearance, notice, cost-bill, statement of facts, bill of exceptions or proposed statement of facts or bill of exceptions in any action or proceeding whether pending or not, or the draft of any bill or resolution that has been presented to either house of the

legislature of this state, whether engrossed or not, or the great seal of this State, the seal of any public officer, court, notary public or corporation, or any public seal authorized or recognized by the laws of this state or any other state or government, or any impression of any such seal; or shall forge or counterfeit any coin or money of any state or government, or any bank or treasury bill, any note or postage or revenue stamp; or who, without authority shall make or engrave any plate in the form of similitude of any writing, instrument, seal, coin, money, stamp or thing which may be the subject of forgery, shall be guilty of forgery in the first degree and shall be punished by imprisonment in the state penitentiary for not more than twenty years."

(NOTE.) For the sake of avoiding repetition, Sec. 2, of Chap. 114, Laws of Washington, 1935, is not copied herein but is found in entire law attached as an appendix.)

It is obvious that section 2281 which was in force at the time the crime was committed, provides that whenever any person shall be convicted of any offense where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion, at not less than 6 months nor more than 5 years, the court was there required to fix a minimum of not less than 6 months nor more than 5 years. One sentenced where no minimum is fixed by law was entitled to a minimum sentence between 6 months and 5 years, and the period of which is to be in the discretion of the court. It is further provided in section 2583 which fixes the maximum term of sentence for forgery in the first degree at a term of not more than 20 years, was not repealed by chapter 114, and was in force both at the time the crime charged was committed and when the petitioner was sentenced, and that section 2281 provides for the imposing of a minimum sentence between 6 months and 5 years. Now section 2 of chapter 114 of the enactment of 1935 provides that when a person is convicted of forgery in the first degree, which is a felony, the punishment shall be the maximum term fixed by law, and if the law does not provide a maximum term the court shall fix such maximum

term which shall be for any number of years up to and including life imprisonment, but not less than 20 years.

The Attorney General of the State in resisting the issuance of the writ asserts; first, that the writ of habeas corpus is not the proper remedy on behalf of the petitioner, and, second: that the enactment of 1935 is not ex post facto as it does not inflict a greater punishment or alter petitioner's situation to his disadvantage as he was sentenced under the enactment of 1935 which merely creates a parole board and under section 2583 which was in force at the time the crime was committed. It would seem clear that the remedy is granted to the petitioner under Section 10, Article One of the Federal Constitution, which provides that: "No State shall • • • pass any bill of attainder, ex post facto law • • •.", and under Sections 451-466 of Title 28 U. S. C. A. Where the legality of his sentence and punishment are involved and is based upon the contention that the law under which he was sentenced is an ex post facto one, and the facts show that the sentence inflicts a greater punishment than the law annexed to the crime at the time it was committed, or alters the situation of the accused to his disadvantage, the remedy by writ of habeas corpus is granted.

We find that at the time the alleged crime was committed on April 20, 1935, as charged in count one of the information both sections 2281 and 2583 of the statutes of the State of Washington were in force and by section 2583 the court was required to sentence the petitioner to not more than 20 years imprisonment. This later section was also in force at the time the sentence was pronounced by the court who had the discretion, under it, to pronounce a maximum sentence for any period within 20 years, and had not section 2281 been repealed would have been required to pronounce a minimum of not less than six months nor more than five years, as provided for by section 2281, or, in other words, the court would have been required to pronounce both a maximum and a minimum, because section 2583 providing for the maximum sentence does not fix the minimum sentence thereby requiring the application of section 2281.

The inquiry then arises, does the failure to pronounce a minimum sentence as provided for by section 2281 and the pronouncement of a flat sentence of not more than 20 years under the enactment of 1935 increase the punishment of petitioner or change the situation to his disadvantage. The clear rule of law to test ex post facto legislation under the term as found in the constitution of the United States and recognized by the Supreme Court was laid down by Mr. Justice Chase in the case of Calder *v.* Bull, 1 Law Ed. 648, where it is said:

(1) Every law that makes an action, done before the passing of the law and which was innocent when done, criminal and punishes such action;

(2) Every law that aggravates the crime or makes it greater than it was when committed;

(3) Every law that changes the punishment and inflicts a greater punishment than was annexed to the crime when committed;

(4) Every law that alters the legal rule of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

Also ex parte Medley, 134 U. S. 160.

By this test and term we are required to make an analysis of the provisions involved in the statutes of the state and ascertain whether they should be applied to the sentence and punishment of the petitioner. It is apparent that after the repeal of section 2281 which required the application of a sentence as to a maximum sentence at the time the crime was committed and the modification of section 2583 by section 2 of the enactment of 1935, the law in force at the time the crime was committed was changed by the enactment of 1935 which changed the punishment and inflicted a greater punishment than the law annexed to the crime when committed, by the repeal of section 2281 guaranteeing to the petitioner at the time the crime was committed a minimum sentence of not less than six months nor more than 5 years, prohibited the court from

pronouncing a minimum to which the petitioner was entitled and which worked to his disadvantage in considering of the application for parole as he would have become subject to the consideration of a parole after he had served the minimum sentence, by a parole board of three persons, sections 2282 and 10803 statutes of the state, and further it appears clear that under section 2583 which was in force at the time the crime was committed, fixing the maximum of not more than 20 years in the discretion of the court, which also was changed by the enactment of 1935 which changed the punishment and inflicted a greater punishment than the law imposed at the time the crime was committed, as it is there provided that "The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; if the law does not provide a maximum term for the crime for which such person was convicted, the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment; provided, however, that in any case where such maximum term is fixed by the court that maximum term shall be fixed at not less than 20 years. So it will be seen by section 2 of the enactment of 1935 a definite maximum punishment of 20 years is fixed which the court is compelled to pronounce and its discretion to fix the sentence for any time less than 20 years has been removed. The petitioner, therefore, was at the time of his sentence entitled to the discretion of the court in fixing his sentence to be at any definite time less than 20 years as a maximum. This he was deprived of, by the enactment of 1935, as section 2 thereof requires the board to fix the duration of his sentence at any time within the 20 years pronounced by the court, for it is there provided that: "Within six months after the admission of such convicted person to the penitentiary or reformatory, as the case may be, the board of prison, terms, and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court where the law does not provide for a maximum term."

No other construction can be placed on the statute as it says "the board of prison, terms and paroles shall fix the duration of his or her confinement", which shall not exceed the maximum provided by law or the maximum fixed by the court.

Mathematically the operation of section 2 of the 1935 enactment inflicts a greater punishment than the law inflicted at the time the crime was committed. That was the result as to petitioner's sentence as his maximum sentence expires June 18, 1955, which the court fixed for a term of not more than 20 years, and being for a definite maximum term of 20 years which he was compelled to pronounce under section 2 of the 1935 enactment. The sentencing judge after being compelled under section 2 of the 1935 enactment to pronounce the maximum of 20 years recommended 2 years, although the newly created board fixed the term of imprisonment at 3 years. If the 1935 enactment was not an ex post facto law the period of confinement of petitioner would be 3 years as fixed by the board, and which is, if the application is had of section 2 of the 1935 enactment, a definite sentence of three years, as the board has fixed that duration of the term of sentence for three years, and it cannot be said when acting under authority granted by this new law that the term fixed by the board was the minimum, for it had no such authority to fix a minimum, but only to fix the duration of confinement at any time under 20 years, and not between certain limits. But it is further urged by the Attorney General of the State that the 1935 enactment does not inure to the disadvantage of the petitioner in the matter of the duration of his imprisonment, as it only creates a board of paroles who fixes the minimum sentence within the maximum fixed by the law or the court. This construction cannot be followed, if, as already said, that section 2 of the 1935 enactment requires of the board to "fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense. That provision has no relation to vesting power in the board to fix a minimum or to parole, but relates solely to the fixing of a definite term of imprisonment, with only the limitation of the maximum fixed by law or

the court. The sentencing judge evidently had in mind that the petitioner should not serve a sentence of more than two years, as that was his recommendation, when he attempted to follow section 2 of the 1935 enactment that "it will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance what, in their judgment, should be the duration of such convicted person's imprisonment.

There again it is expressly provided that the power granted to the board is to fixing "the duration of such convicted person's imprisonment", and not a minimum.

If this construction of section 2 of the 1935 enactment be correct then it operates to change the situation of the petitioner to his advantage, which was done. So it will be seen that the sentence is not one inflicted by the court, because the term is definitely fixed by the board, to which the legislature in effect has attempted to grant power judicial in character to the board to fix a definite sentence, and is not either a minimum sentence or a matter of prison discipline.

It was thought at the time the original petition was presented to the court that the enactment of 1935 did not change the situation of petitioner to his disadvantage as the sentencing judge had power to pronounce a maximum sentence of twenty years, and the board having fixed the sentence of petitioner at 3 years, he was not prejudiced, but upon further consideration of the new law together with sections 2583 and 2281 of the statutes of the State, the conclusion there reached should be modified to the effect as here stated, and that the enactment of 1935, so far as it attempted to be applied to the sentence and term of confinement of petitioner is ex post facto in effect, and the term of imprisonment attempted to be fixed by the board of prison, terms and paroles, of the petitioner is illegal and of no effect, and it so being illegal the State trial court still has jurisdiction to impose a correct sentence, although the term at which he pleaded guilty and was sentenced has passed. The record shows that the petitioner was properly convicted. The error was in the sentence of the

court and in the attempt of the board of prison, terms and paroles to fix a definite term of imprisonment under an ex post facto law, and there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the State trial court in which he was convicted. This procedure is in compliance with section 461 Title 28 U. S. C. A., which requires a Federal Court in a proceeding for a writ of habeas corpus "to dispose of the party as law and justice require" and in the interpretation of the Federal Statute by the 8th Circuit Court of Appeals in the case of Bryant *v.* U. S., 214 Fed. 51, where the rule is clearly stated and the authorities reviewed, and further that it should be considered that because Sec. 2281 of the statutes of the State, relating to the minimum sentence was repealed by the enactment of 1935, it does not prevent the State trial court from now applying it to the sentence of the petitioner, for it was in force at the time the crime here was committed and the petitioner is entitled to its application when he is sentenced, under the reasons thus given, because its repeal by the latter act is ex post facto in effect.

As to petitioner's contention that the enactment of 1935 deprived him of the right of restoration of citizenship which alters his situation to his disadvantage, it is thought that since the accused has still the right of restoration of citizenship under the 1935 enactment, to be considered and determined by the Governor of the State.

In view of the conclusion thus reached the petitioner is remanded to the custody of the Sheriff of King County, Washington, to be taken before the State Superior Court of King County, and sentence properly imposed.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1936

No. 660

ELBERT B. LINDSEY AND E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PETITIONERS.

SPENCER GORDON,
Counsel for Petitioners.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

BRIEF FOR PETITIONERS.

Report of Opinion Below.

The opinion of the Supreme Court of Washington (R. 87) is reported in 87 Wash. 298, 52 Pac. (2d) 1246.

Jurisdiction.

This case is on certiorari to the Supreme Court of the State of Washington under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat.

936, 28 U. S. C. A. § 344. The judgment of the Supreme Court of Washington was entered November 2, 1936 (R. 76). The petition for certiorari was filed in this Court January 16, 1937, and the writ was granted April 5, 1937.

Question for Argument.

By order of this Court entered April 5, 1937:

> "The petition for writ of certiorari to the Supreme Court of the State of Washington is granted, limited to the question as to whether Chapter 114 of the Laws of Washington of 1935, as here applied, is invalid as an *ex post facto* law within the meaning of Art. I, Sec. 10, of the Constitution."

Statement of the Case.

The petitioners, who had been found guilty of larceny, were sentenced under a statute which went into effect after the date of the commission of the alleged crime. It is their contention that this statute altered the situation to their disadvantage by inflicting a greater punishment than did the statute applicable when the alleged crime was committed.

September 4, 1935, an information was filed, in the Superior Court of the State of Washington in and for the County of Spokane, against the petitioners, Elbert B. Lindsey and E. R. Lindsey, charging them with the crime of grand larceny, in that "on or about the 15th day of April, 1935" they fraudulently obtained $40 by means of a bad check (R. 1).

September 14, 1935, the petitioners were found guilty of grand larceny (R. 49).

November 1, 1935, the petitioners were sentenced to be punished—

> "by confinement * * * for a term of not more than fifteen years, * * *"

with costs (R. 50, 51).

On appeal to the Supreme Court of Washington the petitioners assigned as error—

> "The law under which defendants were tried, convicted and sentenced was, and is, as to them void, being an *ex post facto* law being in direct violation of Section 10 of Article I, of the Constitution of the United States: 'No state shall • • • pass any • • • *ex post facto* law.''

This point was elaborated in the assignment (R. 63, 64).

November 2, 1936, the Supreme Court of Washington affirmed the judgment of the Superior Court (R. 76). In its opinion the Court stated in part:

> "We are obliged to conclude that chapter 114, Laws of 1935, does not violate the prohibition contained in the Federal Constitution regarding the passage of *ex post facto* laws" (R. 91, 92).

Statutes Involved.

Statute in Effect April 15, 1935, the Date of the Alleged Crime.

The petitioners were convicted of larceny under certain statutes of the State of Washington contained in Remington's Revised Statutes 2601 (2) and 2601-2 (R. 1, 44, 49), which were in effect when the alleged crime was committed and at the time of sentence. There is no contention that there was any change in the definition of larceny. The change in statute had to do with the penalty.

On April 15, 1935, the date of the alleged crime, the penalty for grand larceny was "imprisonment in the state penitentiary for not more than fifteen years". Rem. Rev.

Stat. 2605. No minimum term was prescribed. It was further provided that "the Court must pronounce judgment", "the defendant must be personally present", and "be • • • asked whether he have any legal cause to show why judgment should not be pronounced against him". (Rem. Rev. Stat. 2190, 2196, 2198.)

On April 15, 1935, there were also in effect the following sections of Rem. Rev. Stat.:

Section 2281 provided for indeterminate sentences for conviction of any felony "for which no fixed period of confinement is imposed by law". The indeterminate sentence was to be "for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense • • • and where no minimum term of imprisonment is prescribed by law, the Court shall fix the same in his discretion at not less than six months nor more than five years; • • •"

Section 2282, as modified by Section 10803, provided for a parole board, which might "at any time after the expiration of the minimum term of imprisonment • • • direct that any prisoner • • • shall be released on parole • • •"

Statute in Effect November 1, 1935, under which Sentence Was Pronounced.

June 12, 1935, after the commission of the alleged crime, there went into effect a statute contained in Chapter 114 of the Laws of Washington for 1935. (See also fly leaf Laws 1935.)

This statute repealed Section 2281, Rem. Rev. Stat. providing for indeterminate sentences, and Section 2282 thereof providing for parole after the minimum term, together with other statutory provisions not directly involved in this case.

In lieu of the provisions repealed the said Chapter 114 provided as follows:

> "When a person is convicted of any felony [with certain exceptions not material], the court * * * shall fix the maximum term of such person's sentence only.
>
> "The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; * * *."

Within six months after the admission of the convicted person to the penitentiary the board of prison, terms and paroles—

> "* * * shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense * * *."

If a convicted person undergoing sentence commits any infraction of the rules and regulations the board—

> "* * * may revoke any order theretofore made determining the length of the time such convicted person shall be imprisoned, and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted * * *."

A convicted person may be released on parole by the board after serving the period of confinement fixed by the board less time credits for good behavior and diligence not exceeding "one-third of his sentence as fixed by the board", and the board has power—

> "* * * to return such person to the confines of the institution from which he or she was paroled, at its discretion."

The Governor is also authorized to cancel and revoke paroles granted by the board.

The act further provides:

> "From and after the suspension, cancellation, or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term."

Sentence was pronounced upon the petitioners pursuant to Chapter 114 of the Laws of Washington for 1935. This is shown by the fact that the sentence was "for a term of not more than fifteen years" (R. 50, 51). Had the sentence been under the statute in effect prior to June 12, 1935, maximum and minimum terms would have been fixed. The opinion of the Supreme Court of Washington states that the sentence was under the Act of 1935 (R. 90, 91).

Specification of Error.

Petitioners contend that the Supreme Court of the State of Washington erred in holding that the sentences of petitioners did not violate the inhibition contained in Section 10, Article I, of the Constitution of the United States against *ex post facto* laws.

Summary of Argument.

The Act of 1935 in its application to the petitioners is an *ex post facto* law in that it changes to the disadvantage of the petitioners the punishment annexed to the alleged crime of grand larceny. The new law deprives the petitioners of an opportunity to be heard on the question of the duration of their confinement, and apparently deprives

them even of the right to be notified of such duration. It postpones final determination of the maximum term of imprisonment, and increases the possible maximum term by providing that a paroled person shall be considered an escapee during the period between revocation of parole and reconfinement. It deprives the petitioners of the right to apply for parole after a minimum sentence of from six months to five years. In a similar case, the United States District Court has ordered the release of a person sentenced under the Act of 1935 for the crime of grand larceny committed before it went into effect.

Argument.

Any Law Is Ex Post Facto Which Inflicts a Greater Punishment Than the Law Annexed to the Crime When Committed or Which Alters the Situation of the Accused to His Disadvantage.

Section 10 of Article I of the Constitution of the United States provides:

> "No State shall • • • pass any Bill of Attainder, *ex post facto* Law, or Law impairing the Obligation of Contracts, • • •."

The leading case on *ex post facto* laws is *Calder* v. *Bull*, 3 Dall. 386, 1 L. Ed. 648, where Mr. Justice Chase promulgated the following definition:

> "I will state *what laws* I consider *ex post facto laws*, within the *words* and the *intent* of the prohibition. 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates a crime*, or makes it *greater* than it was,

when committed. 3d. Every law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order to convict the offender* • • • (P. 390).

"But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the *criminal* law; but only those that *create*, or *aggravate*, the *crime*; or encrease the punishment, or change the rules of evidence, *for the purpose of conviction*" (P. 391).

In *ex Parte Medley*, 134 U. S. 160, 33 L. Ed. 835, this Court said:

"• • • any law which was passed after the commission of the offense for which the party is being tried is an *ex post facto* law when it inflicts a greater punishment than the law annexed to the crime at the time it was committed; • • • or which alters the situation of the accused to his disadvantage; • • •" (P. 171).

Examples of statutes involving punishments which have been held *ex post facto* include:

DEFERRING THE EXACT DETERMINATION OF THE PUNISHMENT AND KEEPING THE CONVICTED PERSON IN SUSPENSE.

In *Hartung* v. *People*, 22 N. Y. 95, the new statute provided for one year at hard labor and execution thereafter at any time upon the order of the Governor with or without notice, instead of execution after a period of not less than four nor more than eight weeks as fixed by the court. The opinion states:

"The sword is indefinitely suspended over his head, ready to fall at any time. It is not enough to say, if even that can be said, that most persons would prob-

> ably prefer such a fate to the former capital sentence. It is enough to bring the law within the condemnation of the constitution, that it changes the punishment, after the commission of the offence, by substituting for the prescribed penalty a different one. We have no means of saying whether one or the other would be the most severe in a given case; that would depend upon the disposition and temperament of the convict. The legislature cannot thus experiment upon the criminal law" (Pp. 105-106).

In *Medley, Petitioner*, 134 U. S. 160, 33 L. Ed. 835, a statute was held *ex post facto* which conferred upon the warden of the penitentiary the power to fix the date of execution and which compelled him to withhold the knowledge of the date from the offender. This Court said:

> "Nor can we withhold our conviction of the proposition that when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it, which may exist for the period of four weeks, as to the precise time when his execution shall take place" (P. 172).

Increasing the Minimum Punishment.

In *Beard* v. *Maryland*, 74 Md. 130, 21 Atl. 700, the statute imposed a fine of not less than $50 nor more than $300 or imprisonment in jail for not less than ten days nor more than six months or both fine and imprisonment for keeping a disorderly house, which act had theretofore been a common law misdemeanor with a punishment of a fine or imprisonment both in the discretion of the court. It was held:

> "As the Act of 1890 makes the minimum penalty for the offense greater than the lowest limit at common law, it is quite apparent that the statute is as to Beard

an *ex post facto* law, and that he cannot be punished under it" (P. 132).

Lindzey v. *The State*, 65 Miss. 542, 5 So. 99, involved a statute which changed the penalty for carrying concealed weapons from a fine not exceeding $100, and in the event the fine and costs be not paid, then work at hard labor not exceeding two months, to a fine not exceeding $100 nor less than $25, and in the event the fine and costs be not paid then hard labor not exceeding two months nor less than one month. The statute was held *ex post facto* as to an act committed before its passage "because it changed but did not mitigate the punishment for the offense" (P. 545).

In *Commonwealth* v. *McDonough*, 13 Allen (95 Mass.) 581, a statute was held *ex post facto* which changed the punishment for keeping a disorderly house from a fine of not less than $200 nor more than $1,000 *or* imprisonment for not more than a year, to a fine of not less than $50 nor more than $100 *and* imprisonment for not less than three months nor more than twelve, although the new statute provided that the punishment might be by fine *or* imprisonment in all cases where the offender should prove that he had not before been convicted of a similar offense. The Court pointed out that there was an increase in the minimum prison sentence.

Taking Away the Right to Apply for Parole

In *State* v. *Board of Parole*, 155 La. 699, 99 So. 534, one Woodward had applied for mandamus to compel the Parole Board to file and consider his application. Woodward had been sentenced to a life term in 1914 under a statute permitting paroles to convicts serving life sentences. Under a subsequent act of 1916 life-termers were excluded

from parole. The Board of Parole was ordered to file and to consider the application, the Court saying:

> "There can be no doubt but that the right to be considered for a parole, after the expiration of one-third of the actual time required to be served, with the benefit of commutation under other laws (in his case something in excess of three years), was a substantial one; • • • Of course, the right was not absolute or fixed in the sense that he was bound to be paroled; but the privilege of having his case submitted to the discretion of the board at the proper time did exist; whereas, now, it is entirely taken away, and the board cannot even consider it under the present law.
>
> "It would seem clear, therefore, that to give the Laws of 1916 a retrospective effect would operate seriously to his disadvantage, in violation of the inhibition of the Constitution against ex post facto laws" (p. 704).

LENGTHENING TERM BY EXCLUDING PERIOD AT LARGE AFTER VIOLATION OF PAROLE.

State v. *Tyree*, 70 Kan. 203, 78 Pac. 525, involved a statute which provided that if a prisoner violated a parole he should be arrested and compelled to serve out the unexpired term of the maximum imprisonment, and that the time from the date of his declared delinquency to the date of his arrest should not be counted as any portion or part of the time served. The Court said:

> "• • • Other provisions of the act authorize the prison board to make prison rules and stipulate conditions in the parole, a violation of which, although not a violation of any law, would subject the paroled prisoner to rearrest and reimprisonment. The time between the declared delinquency and the arrest not being deducted from the maximum time, the period

within which appellant might obtain his liberty is extended beyond the maximum time for which he could have been sentenced under the law in existence when the offense was committed, this excess of time depending upon the activity, or negligence, of the officers whose duty it would be to issue or execute a warrant for the arrest. For these reasons the sentence imposed was *ex post facto*, and should be set aside" (pp. 209-210).

INCREASING THE PUNISHMENT IN OTHER RESPECTS.

Addition of imprisonment by solitary confinement until execution, *Medley, Petitioner*, 134 U. S. 160, 33 L. Ed. 835. Providing that prisoners released for good behavior shall be on parole, *People of the United States* v. *McDonnell*, 11 Fed. Supp. 1014.

The Effective Date of the Statute is the Material Date in Determining Whether it Is an Ex Post Facto Law.

Chapter 114 of Laws of Washington for 1935 was approved by the Governor March 20, 1935, but it did not go into effect until June 12, 1935, which was ninety days after the adjournment of the legislature. (See flyleaf to Laws 1935.)

In the two decisions of the United States District Court discussed in the last section of this brief, Ch. 114, Laws 1935, was held *ex post facto* because it went into effect after the commission of the alleged crimes involved in the cases. In the opinion of the Supreme Court of the State of Washington in this case there is no suggestion that any date other than the effective date of the act is the material date in determining whether or not it is *ex post facto* (R. 90).

In *State* v. *Smith*, 56 Ore. 21, 107 Pac. 980, a statute was held *ex post facto* which increased the punishment for a

crime committed after the statute was filed with the Secretary of State but before it became effective ninety days later. In *People* v. *McDonnell,* 11 F. Supp. 1014, the effective date of the act was taken as the significant date.

June 12, 1935, should therefore be taken as the material date in determining whether Ch. 114, Laws 1935, is an *ex post facto* law.

The Act of 1935 Inflicted a Greater Punishment than the Law Annexed to the Alleged Crime at the Time it was Committed and Altered the Situation of the Petitioners to Their Disadvantage.

The decision of the Supreme Court of Washington was based on the following reasoning:

> "The amending act does not change or inflict a greater punishment than the law in force when the alleged crime was committed, for the court could under the law in force at that time pronounce a maximum sentence of not more than fifteen years. The minimum and maximum punishments remained the same as before the enactment of the Act of 1935" (R. 91).

It is respectfully submitted that this statement indicates a failure to analyze the provisions of the statutes.

In the following respects the Act of 1935 altered the situation to the disadvantage of the petitioners:

1. *Deprivation of opportunity to be heard on question of duration of confinement and of right to be notified of decision:* By the law of Washington the defendant must be personally present when sentenced and must be given an opportunity to make a statement. Thus in this case

each petitioner made "his statement" before judgment was entered (R. 50, 51). This was a valuable privilege under the law existing at the date of the commission of the alleged crime, for the duration of confinement was determined by the sentence of the court. But under the later statute the court has no discretion in imposing sentence, so that the opportunity of the defendants to be present and make a statement to the court is of no advantage to them. The duration of confinement is fixed by the board of prison terms and paroles "not to exceed the maximum provided by law for the offense". There is no requirement that the convicted person shall be present when the term is fixed, and there is no provision for any statement to be made by the convicted person. There is not even any statutory requirement that the convicted person shall be notified of the term fixed by the board.

2. *Postponement of final determination of maximum penalty, and increase in possible maximum penalty:* As stated by the Supreme Court of Washington, under either statute, the maximum penalty *may* be fifteen years. But under the earlier statute the judge might fix the maximum in his discretion at less than fifteen years, and at the end of the time so fixed the convicted person would certainly have gone free. Whereas, under the later statute, after the board has *originally* fixed the term, if the convicted person commits an infraction of the rules the board may "make a new order determining the length of time he shall serve, not exceeding the maximum penalty provided by law for the crime". Thus, under the earlier statute if the court in its discretion fixed a maximum sentence of three years the convicted person could not serve for more than three

years. His term would then be over. But under the later statute if the board in the exercise of its discretion originally fixes a term of three years, the convicted person will have hanging over him the possibility that the sentence may be thereafter increased to fifteen years because of an infraction of the rules. Such a sentence may even run for more than fifteen years in the case of a person who has been paroled and whose parole has been revoked, for no part of the time during the period between such revocation and his return to custody is to be considered a part of his term.

3. *Increase in minimum penalty:* As stated by the Supreme Court of Washington, the minimum sentence under either statute *may* be six months. But under the earlier statute the convicted person had the absolute right to a minimum sentence of not more than five years, after which time he was entitled to apply for parole. Whereas, under the later statute, the board may fix as the duration of confinement any term not exceeding the maximum provided by law, and the convicted person cannot be paroled until the term fixed by the board has expired, less time credits for good behavior not exceeding one-third of the sentence as fixed by the board. Thus, the petitioners in this case would have been entitled as of right under the earlier statute to a minimum sentence of not more than five years, after which time they could have applied for parole, whereas, under the later statute pursuant to which they were sentenced, the board might, originally or by redetermination, fix their term at eight years or more, so that even after allowing them one-third credit for good behavior they would necessarily be confined for more than five years. *Petitioners have thus lost the valuable right to apply for parole after five years.*

In a Similar Case the United States District Court Has Ordered the Release of a Person Sentenced Under the Act of 1935 for the Crime of Grand Larceny Committed Before It Became Effective.

Copy of a decision of District Judge Cavanah November 21, 1936, in the District Court of the United States for the Western District of Washington, Southern Division, in the case of *Andrus* v. *McCauley*, is attached to the petition for certiorari in this case as Appendix 2 thereof. Appended to the present brief is a copy of a memorandum opinion of District Judge Webster entered in the same court February 24, 1937, in the case of *Palmer* v. *McCauley*. From these two opinions, and from the opinion of the Supreme Court of Washington in the present *Lindsey* case (R. 87), may be constructed the following record of the recent decisions of the State and Federal courts in the State of Washington on the subject involved in this case:

August 3, 1936, Judge Cavanah filed his first opinion in the case of *Andrus* v. *McCauley* to the effect that there was not sufficient reason shown to warrant the issuance of the writ of habeas corpus (Petition for Certiorari p. 64). This opinion is mentioned by the Supreme Court of Washington in its opinion (R. 91).

August 20, 1936, the Supreme Court of Washington filed its opinion holding that Ch. 114, Laws 1935, Rem, Rev. Stat. 10249 *et seq.* was not *ex post facto* in its application to the Lindseys, petitioners in this case.

November 21, 1936, upon consideration of an amended petition for *habeas corpus*, District Judge Cavanah filed his second opinion in the case of *Andrus* v. *McCauley*, holding

that Ch. 114, Laws 1935, Rem. Rev. Stat. 10249, was an *ex post facto* law as applied to the sentence of Andrus. Judge Cavanah held that the State trial court still had jurisdiction to impose a correct sentence, and he remanded the petitioner to the custody of the sheriff "to be taken before the State Superior Court of King County and sentence properly imposed" (Petition for Certiorari, p. 73).

February 24, 1937, District Judge Webster filed an opinion in *Palmer* v. *McCauley*, a *habeas corpus* case in which, as in the *Lindsey* case, the petitioner had been sentenced under the Act of 1935 for grand larceny committed before the statute went into effect. Judge Webster agreed with Judge Cavanah that the Act of 1935 was *ex post facto*, but, instead of remanding the petitioner for further sentence, he ordered the petitioner discharged. Judge Webster quoted from the opinion of the Supreme Court of Washington in the *Lindsey* case and said:

> "• • • the inescapable effect of the decision is that the act of 1935 governs the punishment for crimes committed prior to its enactment. Unless this is so there would have been no occasion to pass upon the question of the *ex post facto* character of that act, which the Court proceeded to do. This holding of the Supreme Court of the State of Washington that Chapter 114, Laws 1935, governs the punishment of crimes committed prior to its enactment is binding upon me. It amounts to an interpretation and construction of the Statutes of Washington, which a Federal Court is not at liberty to disregard. • • •
>
> "• • • The decision of the Supreme Court of Washington in the Lindsey case as I read it will not permit the resentencing of the petitioner under the laws in force at the time the crime was committed because 'at the time of the trial a new law had come into existence', namely, Chapter 114, Laws 1935. Unless such new law was applicable to Lindsey's case no new

law had come into existence which the Court could have considered in connection with the propriety or the legality of his sentence. No Superior Judge in the face of the decision in the Lindsey case could be expected to or would undertake to resentence the petitioner under the 'old' law. To do so would be to ignore the Supreme Court's holding in the Lindsey case. It would be idle, therefore, for me to remand the petitioner for resentence. The only alternative is to discharge the petitioner from his imprisonment."

Conclusion.

It is respectfully submitted that the decision of the Supreme Court of Washington that Chapter 114 of the Laws of 1935 governs the punishment of crimes committed before it became effective is binding upon this Court. The conclusion of the Supreme Court of Washington, however, that the Act of 1935 is not *ex post facto* when applied to such crimes is not binding on this Court. It is urged therefore that this Court determine that Chapter 114 of the Laws of 1935 is invalid as an *ex post facto* law as applied to the petitioners in this case, and that the case be reversed and remanded to the Supreme Court of Washington with instructions to take such further proceedings as are necessary to effect the discharge of the petitioners.

Respectfully submitted,

SPENCER GORDON,
Attorney for Elbert B. Lindsey and E. R. Lindsey, Petitioners.

APPENDIX.

Statutes Relating to Penalty for Grand Larceny Prior to Midnight June 12, 1935.

From Remington's Revised Statutes:

Sec. 2605, Grand Larceny—Penalty.—Every person who shall steal or unlawfully obtain, appropriate, bring into this state, buy, sell, receive, conceal, or withhold in any manner specified in Section 2601—,

• • •

(5) Property of the value of more than twenty-five dollars, in any manner whatever,

Shall be guilty of grand larceny and be punished by imprisonment in the state penitentiary for not more than fifteen years.

Sec. 2281, Indeterminate Sentences.—Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state penitentiary, or in the Washington State Reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and when no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment.

Sec. 2282. The board having control to determine period of imprisonment.—The state board of control, acting in conjunction with the warden of the state penitentiary, or the board of managers of the Washington state reformatory, acting in conjunction with the superintendent of such reformatory, as the case may be, may at any time after the expiration of the minimum term of imprisonment for which

such prisoner was committed thereto, direct that any prisoner confined in such institution shall be released on parole upon such terms and conditions as in their judgment they may prescribe in each case.

Sec. 10803. Parole Boards—Powers and duties.—The governor shall, from time to time, appoint parole boards, of three members, who shall, respectively, exercise all the powers and perform all the duties relating to the parole of prisoners from the state penitentiary and the Washington state reformatory, now vested in, and required to be performed by, the state board of control and the board of managers of the reformatory, respectively, and shall, from time to time, appoint a parole board, of three women, who shall exercise all the powers and perform all the duties relating to the parole and discharge of inmates from the women's industrial home and clinic, now vested in and required to be performed by, the board of directors of that institution. The members of all such parole boards shall hold office at the pleasure of the governor and shall each receive ten dollars per diem for time actually and necessarily spent in the discharge of their duties, and their actual and necessary traveling expenses, to be paid out of the moneys appropriated for supplies, material, and service, for the several institutions.

Material Provisions of Ch. 114, Laws 1935, Rem. Rev. Stat. Sec. 10249 et seq.

Rem. Rev. Stat. Sec. 10249-2.

SECTION 2. When a person is convicted of any felony except treason, murder in the first degree, carnal knowledge of a child under ten years, or of being a habitual criminal within the meaning of the statute which provides for life imprisonment for such habitual criminals, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only.

The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; if the law does not provide a maximum term for the crime for which such person was convicted, the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment; provided, however, that in any case where such maximum term is fixed by the court, that maximum term shall be fixed at not less than twenty (20) years.

* * * * * * *

After the admission of such convicted person to the penitentiary or reformatory, as the case may be, it shall be the duty of the board of prison, terms and paroles to obtain from the sentencing judge and the prosecuting attorney, a statement of all the facts concerning such convicted person's crime and any other information of which they may be possessed relative to such convicted person, and it shall be the duty of the sentencing judge and the prosecuting attorney to furnish the board of prison, terms and paroles with such information. It will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance what, in their judgment, should be the duration of such convicted person's imprisonment.

Within six months after the admission of such convicted person to the penitentiary or the reformatory, as the case may be, the board of prison, terms and paroles shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court where the law does not provide for a maximum term.

* * * * * * *

In case any convicted person undergoing sentence in the penitentiary or the reformatory commits any infractions of the rules and regulations of the penitentiary or reformatory, as the case may be, the board of prison, terms and paroles may revoke any order theretofore made determining the length of the time such convicted person shall be

imprisoned, and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted, or the maximum fixed by the court.

• • • • • • •

Rem. Rev. Stat. Sec. 10249-4.

SECTION 4. The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or reformatory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him or her by the board of prison, terms and paroles, less time credits for good behavior and diligence for work as provided by this board; provided, that in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.

The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion.

The board of prison, terms and paroles may impose as a condition of a parole granted a convicted person that all or a portion of his or her credits earned, or to be earned, shall be forfeited in the event that such convicted person shall break his or her parole, or violate any law of the State or rule or regulation of the penitentiary or reformatory, as the case may be, or the board of prison, terms and paroles.

• • • • • • •

From and after the suspension, cancellation or revocation of the parole of any convicted person and until his return to custody, he shall be deemed an escapee and fugitive from justice and no part of the time during which he is an escapee or fugitive from justice shall be a part of his term.

• • • • • • •

SECTION 9. Sections 2278, 2281, 2282, 2195, 10247, 10248, 10249, 10238, 10239, 10803, 10280-6, 10280-10, 10280-11, 10280-12, 10280-15, 10280-16, 10237-1 and 10237-2, of Remington's Revised Statutes of Washington, be, and the same are hereby repealed.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

Filed in the U. S. District Court, Eastern Dist. of Washington, Feb. 24, 1937. A. A. LaFramboise, Clerk.

No. 5106.

J. R. PALMER, *Petitioner,*

vs.

J. M. McCAULEY, as Warden of the Washington State Penitentiary at Walla Walla, Washington, *Respondent.*

Memorandum Opinion.

WEBSTER, *District Judge:*

The petitioner was charged in the Superior Court of the State of Washington for Spokane County with the crime of grand larceny, committed on April 16, 1935. On September 21, 1935, he was convicted and sentenced to the penitentiary for 15 years. No minimum sentence was fixed by the Court as provided by Section 2281 Rem. Rev. Stat. notwithstanding that section was in force at the time of the commission of the crime. Section 2605 Rem. Rev. Stat. fixes the punishment for grand larceny at "imprisonment in the state penitentiary for *not more* than 15 years," leaving the minimum sentence to be fixed as provided by Section 2281, *supra.* The 1935 session of the legislature of Washington enacted Chapter 114 relating to persons convicted of felony, creating a board of prison terms and paroles and defining the duties of such board. Section 2 of this statute provides that the Court shall fix the maximum term of imprisonment only in certain felonies and that the maximum so fixed *shall* be the maximum provided by law for the crime of which the person sentenced was convicted. The statute does not empower the Court to fix a minimum sentence. Instead the act provides that within six months

after the admission of a convicted person to the penitentiary the board of prison terms and paroles "shall fix the duration of his or her confinement" which shall not exceed the maximum punishment prescribed by law. Section 9 of Chapter 114, Laws 1935, expressly repeals, among other statutes, Sections 2281 and 2282 of Remington's Revised Statutes of Washington. The repealing statute contains no express declaration that the provisions of the new law shall apply to crimes committed prior to its enactment. Notwithstanding the fact that Sections 2281 and 2282, Rem. Rev. Stat. were in effect on April 16, 1935, the date upon which the crime of which petitioner was convicted was committed, the Superior Court for Spokane County sentenced petitioner under the provisions of the act of 1935, which did not go into effect until midnight of June 12, 1935. The board of prison terms and paroles within six months after petitioner arrived at the penitentiary undertook, pursuant to the act of 1935, to fix the duration of his imprisonment at 5 years. Claiming that Chapter 114, Laws 1935, as to crimes committed prior to its effective date is ex post facto and therefore in violation of Article I, Section 10, of the Constitution of the United States, the petitioner has sued out a writ of habeas corpus.

Section 2006 Rem. Rev. Stat. of the State of Washington is a general saving statute effective in case of the repeal or amendment of criminal statutes. It reads as follows:

> "No offense committed and no penalty or forefeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses commited, or

penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein."

The nearest thing found in Chapter 114 in the nature of an express declaration of intention that the act of 1935 is to govern or be applicable to crimes committed before its enactment is this language in Section 4 of that act:

"The provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the penitentiary or reformatory to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all the inmates thereof."

Since this language refers to "convicted persons now serving time" it clearly has no bearing on cases where there had been no conviction and hence no one was serving time at the date on which the act in question went into effect. Furthermore, the language is qualified by these words: "The provisions of this act *so far as applicable thereto* are to apply, etc." The plain inference of this provision is that the act is not intended to cover cases where the crime had been committed prior to the enactment of the statute because in the absence of an express declaration of intention to that effect, as provided in Section 2006, supra, the act of 1935 would not be applicable to crimes committed before its enactment. In addition to this if this provision had been intended to cover all cases where the crimes had been committed before the effective date of the statute it would not have limited its operation to "convicted persons now serving time." An express declaration of legislative intention that a new criminal statute shall apply to crimes committed prior to the enactment of such statute ought not to be

couched in doubtful or uncertain terms. Such a declaration must be definite and explicit. It seems clear to me, therefore, that the language in Section 4 of the Act is not sufficient to meet the requirements of Section 2006, supra, and to remove the act from the saving provisions of that general saving statute. But in any event the language has no application to the petitioner's case because he had not been convicted and was not serving time when the act of 1935 went into effect and its language must be construed as of that date. The act became effective at midnight on June 12, 1935, and the petitioner was not convicted until September 21, 1935. If the question were an open one before me I should have no difficulty at all in reaching the conclusion that the act of 1935 does not apply to crimes committed prior to its enactment but that the punishment for such crimes is governed by the laws in force at the time of their commission, as provided in Section 2006, supra. The hereinabove quoted portion of Section 4 of the act is far from an express declaration to the contrary. However, in the case of State v. Lindsey, Volume 87, Page 298, Washington Decisions, the Supreme Court of Washington, sitting en banc, unanimously upheld a conviction for a crime committed prior to the taking effect of the act of 1935, notwithstanding the convicted persons were sentenced as provided by that act; the Court fixing the maximum punishment and providing no minimum punishment at all. In the course of the opinion the Court say:

> "A number of assignments deal with the sentence. At the time the crime was committed on April 15, 1935, the law provided that the court fix the penalty at not more than fifteen years imprisonment (Rem. Rev. Stat., Sec. 2605 (P. C. Sec. 8948)), and the minimum of not less than six months nor more than five years (Rem. Rev. Stat., Sec. 2281 (P. C. Sec. 8716)). At the time of the trial, however, a new law had come into existence (Chapter 114, Laws 1935, p. 308, 1935 Sup., Sec. 10249-1 (P. C. Sec. 4503-31) et seq.), which created a 'board of prison, terms and paroles' and provided, among other things (Sec. 10249-2 (P. C. Sec. 4503-32)):

> 'When a person is convicted of any felony • • • the court shall sentence such person to the penitentiary or • • • to the reformatory, and shall fix the maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, • • •
>
> 'Within six (6) months after the admission of such convicted person to the penitentiary or the reformatory • • • the board • • • shall fix the duration of his or her confinement • • •.'
>
> It is claimed by appellant that this is an ex post facto law and, therefore, violative of Art. I, Sec. 10, of the United States Constitution, which, among other things, prohibits a state from passing such a law."

It is true that upon the face of the opinion the Court does not notice or discuss Section 2006, Rem. Rev. Stat., but the inescapable effect of the decision is that the act of 1935 governs the punishment for crimes committed prior to its enactment. Unless this is so there would have been no occasion to pass upon the question of the ex post facto character of that act, which the Court proceeded to do. This holding of the Supreme Court of the State of Washington that Chapter 114, Laws 1935, governs the punishment of crimes committed prior to its enactment is binding upon me. It amounts to an interpretation and construction of the Statutes of Washington, which a Federal Court is not at liberty to disregard. The conclusion of the Court however that the act of 1935 is not ex post facto when applied to crimes committed prior to its enactment is not binding upon this Court. This is a Federal question which the Federal tribunals must determine for themselves for it calls for the application of the Constitution of the United States. In holding that the act of 1935 is not ex post facto when applied to prior offenses, the Court cited the opinion of the Honorable Charles C. Cavanah, United States District Judge, sitting in this Court in the case of Andrus v. McCauley, and filed at Walla Walla on August 5, 1936. Later, however, Judge Cavanah granted a rehearing in the case

and on November 24, 1936, filed a carefully prepared and well reasoned opinion in which he held the act of 1935, as applied to cases where the crimes involved had been committed prior to the taking effect of the act, was ex post facto and hence void as in violation of the Constitution of the United States. I do not feel that I can add anything of value to what has been said by Judge Cavanah in his opinion of November 24 in the Andrus case. To my mind it is conclusive. For the reasons assigned by him and upon the authorities cited by him in that opinion I am fully satisfied that the act of 1935 when applied to prior crimes is plainly ex post facto and void.

Having reached this conclusion, what disposition shall be made of the prisoner? Shall he be remanded to the Superior Court of Spokane County for resentence or shall he be discharged from custody? The petitioner was tried before the Honorable Charles H. Leavy, one of the Judges of the Superior Court for Spokane County and by him sentenced upon a verdict of guilty. Judge Leavy is no longer a judge of the Superior Court of Spokane County, having resigned therefrom in December, 1936. The contention has been urged that no judge other than Judge Leavy would be competent to resentence the petitioner even if he should be remanded to the Superior Court for resentence. I do not deem it necessary, however, to go into this difficult and much mooted question. I think the case can be disposed of on other and much more satisfactory grounds. The decision of the Supreme Court of Washington in the Lindsey case as I read it will not permit the resentencing of the petitioner under the laws in force at the time the crime was committed because "at the time of the trial a new law had come into existence", namely, Chapter 114, Laws 1935. Unless such new law was applicable to Lindsey's case no new law had come into existence which the Court could have considered in connection with the propriety or the legality of his sentence. No Superior Judge in the face of the decision in the Lindsey case could be expected to or would undertake to resentence the petitioner under the "old" law. To do so would be to ignore the Supreme Court's holding in the Lindsey case. It would be idle, therefore, for me to

remand the petitioner for resentence. The only alternative is to discharge the petitioner from his imprisonment. Order accordingly will be entered in due course at which time any incidental matters relating to appeal or the like can be provided for. Until the entry of the order petitioner will remain in custody. Counsel for petitioner will at the earliest possible date present an order in conformity with this opinion, after serving a copy thereof on counsel for the respondent together with notice of when such order will be presented for signature. Since the prisoner has been held to be entitled to discharge there must be no inordinate delay.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1936

ELBERT B. LINDSEY and
E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON,
Appellee.

No. 660

ANSWERING BRIEF OF APPELLEE

A. O. COLBURN,
RALPH E. FOLEY,
C. C. QUACKENBUSH,
Attorneys For Appellee.

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No. 660

ANSWERING BRIEF OF APPELLEE

MOTION FOR DISMISSAL

Appellee moves for a dismissal of the petition for writ of certiorari herein on the grounds that the record shows conclusively that no Federal question of substance is raised, and further that in any event the jurisdiction of the Supreme Court of the United States does not attach.

STATEMENT OF THE CASE

Without waiving the above motion, appellee represents: That appellant E. R. Lindsey is an attorney at law (Tr. 26) and that appellant Elbert B. Lindsey is his son (Tr. 27), and that both appellants were convicted on September 14th, 1935 by a jury upon information filed in the superior court of the State of Washington, charging appellants with the crime of grand larceny, the substance of the offense being a check (Tr. 4) drawn on the Spokane and Eastern Trust Company in the amount of $40.00. The check was written by E. R. Lindsey (Tr. 30) and cashed for the face amount by Elbert B. Lindsey (Tr. 4). No funds of any nature were on deposit in the bank on which the check was drawn, nor had any credit arrangements been made for the same. Appellants appealed their conviction to the Supreme Court of the State of Washington and the conviction was affirmed by the court sitting *en banc* in the June, 1936 term. An order denying rehearing was made October 9, 1936.

ARGUMENT

The appellants attempt to invoke the jurisdiction of this Court on several premises, none of which raise any Federal question save and except the *ex post facto* feature of the Parole Board Act of 1935, and, as will be pointed out, appellants' contention in this regard is not of substance.

Appellants' offense was committed in April, 1935 and the Parole Board Act went into effect in June, 1935. Appel-

lants were tried in September, 1935 and sentenced under the Parole Board Act of June, 1935. Appellants completely overlook and fail to call to this Court's attention the general saving provision of the statutes of the State of Washington, Section 2006 of Remington's Revised Statutes, in effect at this time and at all times covered by these proceedings, reading as follows:

> "Sec. 2006. Repeal and amendment of criminal statutes—Saving clause presumed. No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed, or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein."

It is clear in the face of the above statute that the most

that appellants can ask for is a correction of an alleged improper sentence, which appellee does not concede.

The Supreme Court of the State of Washington has passed directly on this question in the cases of *In re Blystone*, 75 Wash. 286, 134 Pac. 827, and *State v. Nicholes*, 135 Wash. 333, 237 Pac. 706.

> "Where a court has exceeded its power in imposing a sentence, a new trial will not be ordered but the case will be remanded to the trial court for the imposition of the proper sentence and judgment."

A similar conclusion was arrived at in the Federal District Court for the Eastern District of Washington, Southern Division at Walla Walla, *Andrus v. McCauley et al*, Cavanah, District Judge, No. L. 1421, decided November 21st, 1936, and cited by appellants in their present petition for writ of Certiorari (Petition 63). Judge Cavanah, in deciding that issue, closes his opinion with this language:

> "In view of the conclusion thus reached, the petitioner is remanded to the custody of the sheriff of King County, Washington to be taken before the State Superior Court of King County and sentence properly imposed."

As in the *Andrus* case, under Sections 452 and 461, Title 28, U.S.C.A., the Federal District Court has complete jurisdiction for the disposition of this case.

The second contention of appellants invokes no Federal question. The claim is made that the certified copies of the records of conviction of both appellants were improperly in-

troduced in evidence. The Supreme Court of the State of Washington passed squarely on this question, following the uniform rule of the several states which holds that it is the verdict of the jury which determines the admissibility of records of conviction as affecting the credibility of witnesses. *State v. Johnson,* 141 Wash. 324, *Manning v. State,* 7 Okl. Cr. 367, 123 Pac. 1029; *Porter v. State,* 20 Okl. Cr. 355, 202 Pac. 1039; *Newcomb v. State* (Okl.), 213 Pac. 900; *State v. Martin,* 176 Wash. 637, 30 Pac. 2d) 660.

Another claim of appellants is that they were questioned by police officers without legal counsel present, but they fail to cite any authority showing that they have a constitutional right to legal counsel before they may be questioned by police officers.

Appellants further contend that the signed statements used against them on the trial were obtained under coercion and duress. The State Supreme Court fully answered this contention in the following language:

> "From the evidence, it can not be said that as a matter of law there was duress; but in any event R. R. S. 2151 provides: 'The confession of a defendant made under inducement with all the circumstances may be given as evidence against him, except when made under the influence of fear produced by threats; but a confession made under inducement is not sufficient to warrant a conviction without corroborating testimony.' Certainly the record discloses much corroborating evidence to sustain the admissibility of the admissions."

The statements of Officers A. E. Aikman support the finding of the State Supreme Court (Tr. 11):

> "Q. (To Aikman) I will ask you to state what the fact is as to any force or threats or duress or anything of that kind in regard to obtaining a statement from Elbert B. Lindsey?
>
> "A. Absolutely none."

Other contentions of appellants in their petition are of a much less substantial nature and in no sense involve any Federal question.

It is therefore respectfully submitted that the petition for writ of certiorari be dismissed.

A. O. COLBURN,
RALPH E. FOLEY,
C. C. QUACKENBUSH,
Attorneys for Appellee.

APR 23 1937
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1936

ELBERT B. LINDSEY and
E. R. LINDSEY,
Petitioners,

vs.

STATE OF WASHINGTON,
Appellee.

No. 660

APPELLEE'S ANSWERING BRIEF

A. O. COLBURN,
RALPH E. FOLEY
C. C. QUACKENBUSH
Attorneys for Appellee.

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In the Supreme Court

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United States

OCTOBER TERM, 1936

ELBERT B. LINDSEY and E. R. LINDSEY, *Petitioners,*

vs.

STATE OF WASHINGTON, *Appellee.*

No. 660

APPELLEE'S ANSWERING BRIEF

In compliance with this Court's order entered in this matter on April 5th, 1937, this brief is limited to the question as to whether Chapter 114 of the Laws of Washington of 1935 is invalid as an *ex post facto* law. While the order reads "within the meaning of Article 1, Section 9, paragraph 3, of the Constitution," it will be assumed that the question is as to the validity of the Parole Board Act within the meaning of Article 1, Section 10, of the Constitution, as prayed for in petitioners' brief, and since the law in question is an enactment of the legislature of the State of Washington and not of Congress.

STATEMENT OF THE CASE

Petitioner E. R. Lindsey is an attorney-at-law (R. 26), and petitioner Elbert B. Lindsey is his twenty-five year old son, living with his parents. (R. 18 & 27). Both petitioners were convicted on September 14th, 1935 by a jury in the superior court of the State of Washington, the charge being the crime of grand larceny. The substance of the offense was a check (R. 4) drawn on the Spokane and Eastern Trust Company in the amount of $40.00. This check was written by E. R. Lindsey (R. 30) and cashed for the face amount by Elbert B. Lindsey. (R. 4). No funds of any nature were on deposit in the bank on which the check was drawn, nor had any credit arrangements been made for the same by the petitioners. (R. 14).

The trial was presided over by the Honorable Chas. H. Leavy, who resigned his office as superior court judge on December 1st, 1936. (R. 36; Stipulation). There are five superior court judges holding office in Spokane County, Washington. (Stipulation).

The offense was committed on April 15th, 1935. The Parole Board act of 1935 went into effect at midnight June 12th, 1935. The petitioners were sentenced by the trial judge on November 1st, 1935, to the penitentiary and reformatory respectively, under the provisions of the Parole Board act of 1935. (R. 50-52).

Petitioners appealed their conviction to the Supreme Court of the State of Washington, and the conviction was

affirmed by the Court, sitting *en banc*, at the June, 1936, term. *State v. Lindsey*, 187 Wash. 364, 61 Pac. (2d) 293.

In their appeal to the Washington State Supreme Court, petitioners attacked Chapter 114 of the Laws of 1935, which hereafter in this brief will be called the Parole Board act of 1935, as being invalid as in violation of Section 10 of Article 1 of the Constitution of the United States relating to *ex post facto* laws. (R. 63).

The Washington State Supreme Court, sitting *en banc*, held unanimously that the Parole Board act of 1935 did not violate the prohibition contained in the Federal Constitution regarding the passage of *ex post facto* laws, and that there was no error in the trial of the case and sustained the validity of the conviction. *State v. Lindsey*, 187 Wash. 364, 61 Pac. (2d) 293. (R. 87-92).

QUESTIONS INVOLVED

There are two questions of law for the determination of this Court in this case. The primary question is whether the Parole Board act of 1935 (Chapter 114 of the Laws of Washington of 1935) is in violation of the prohibition of the Federal Constitution as to *ex post facto* laws; and secondarily, whether the petitioners, having been properly and validly convicted of a felony, should be resentenced by another judge, other than the actual trial judge, of the superior court of Spokane County, Washington, under the general saving clause of the laws of Washington, Section 2006 of

Remington's Revised Statutes, in the event the Parole Board act should be held *ex post facto* as to their sentences.

ANALYSIS OF THE TWO LAWS

The Parole Board act of 1935 (Chapter 114 of the session laws of 1935) provides *in toto* as follows:

"CHAPTER 114

"BOARD OF PRISON, TERMS AND PAROLES.

"AN ACT relating to the provision for the adequate punishment of persons convicted of certain felonies, *their rehabilitation* while in confinement and the necessary supervision after their release to prevent recidivism, and defining the duties of the Board of Prison, Terms and Paroles with relation thereto; and repealing sections 2278, 2281, 2282, 2195, 10247, 10248, 10249, 10238, 10239, 10803, 10280-6, 10280-10, 10280-11, 10280-12, 10280-15, 10280-16, 10237-1 and 10237-2 of Remington's Revised Statutes of Washington.

"Be it enacted by the Legislature of the State of Washington:

"SECTION 1. There is hereby created a board of prison, terms and paroles to administer the provisions of this act. The functions, powers, duties and limitations of this body and the qualifications and the tenure of office of its members will be as hereinafter set forth.

"SEC. 2. When a person is convicted of any felony, except treason, murder in the first degree, carnal knowledge of a child under ten years, or of being an habitual criminal within the meaning of the statute which provides for life imprisonment for such habitual criminals, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if

the law allows and the court sees fit to exercise such discretion, to the reformatory, and shall fix the maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term; if the law does not provide a maximum term for the crime for which such person was convicted, the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment: *Provided, however,* That in any case where such maximum term is fixed by the court the maximum term shall be fixed at not less than twenty (20) years.

"If the sentence of a person so convicted is not suspended by the court, it is hereby made the duty of the superintendent of the penitentiary and the superintendent of the reformatory to receive such a person, if committed to his respective institution, and to imprison him or her until released under the provisions of this act or through the action of the governor.

"After the admission of such convicted person to the penitentiary or reformatory, as the case may be, it shall be the duty of the board of prison, terms and paroles to obtain from the sentencing judge and the prosecuting attorney, a statement of all the facts concerning such convicted person's crime and any other information of which they may be possessed relative to such convicted person, and it shall be the duty of the sentencing judge and the prosecuting attorney to furnish the board of prison, terms and paroles with such information. It will also be the duty of the sentencing judge and the prosecuting attorney to indicate to the board of prison, terms and paroles, for its guidance, what, in their judgment, should be the duration of such convicted person's imprisonment.

"Within six (6) months after the admission of such convicted person to the penitentiary or the reformatory, as the case may be, the board of prison, terms and paroles shall fix the duration of his or her

confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court, where the law does not provide for a maximum term.

"When a convicted person appeals from his or her conviction and is at liberty on bond pending the determination of his or her appeal by the supreme court, credit on his or her sentence will begin from the date of the remittitur. In all other cases, credit on a sentence will begin from the date the judgment and sentence is signed by the court.

"In case any convicted person undergoing sentence in the penitentiary or the reformatory commits any infractions of the rules and regulations of the penitentiary or reformatory, as the case may be, the board of prison, terms and paroles may revoke any order theretofore made determining the length of time such convicted person shall be imprisoned and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted, or the maximum fixed by the court. Such revocation and redetermination shall not be had except upon a hearing upon the question of the infraction of the rules charged to such convicted person before the board of prison, terms and paroles. At such hearing the convicted person, unless outside the walls of the penitentiary or the reformatory, as an escapee and fugitive from justice, shall be present and entitled to be heard and may present evidence and witnesses in his behalf.

"Any convicted person undergoing sentence in the penitentiary or the reformatory, not sooner released under the provisions of this section, shall, in accordance with the provisions of existing law, be discharged from custody on serving the maximum punishment provided by law for the offense of which such person was convicted, or the maximum term fixed by the court where the law does not provide for a maximum term.

"The following limitations will be placed on the board of prison, terms and paroles with regard to fixing the duration of confinement in certain cases, notwithstanding any provisions of the law specifying a lesser sentence, to-wit:

"(a) For a person not previously convicted of a felony but armed with a deadly weapon either at the time of the commission of his or her offense, or concealed deadly weapon at the time of his or her arrest, the duration of such person's confinement shall not be fixed at less than five years.

"(b) For a person previously convicted of a felony either in this state or elsewhere and who was armed with a deadly weapon at the time of the commission of his or her offense, or a concealed deadly weapon at the time of his or her arrest, the duration of such person's confinement shall not be fixed at less than seven and one-half (7½) years.

"The words 'deadly weapon' as used in this section are hereby defined to include any instrument known as a blackjack, sling shot, billy, sand club, sand bag, metal knuckles, any dirk, dagger, pistol, revolver or any other firearm, any knife having a blade longer than three (3) inches, any razor with an unguarded blade and any metal pipe or bar used or intended to be used as a club, any explosive, and any weapon containing poisonous or injurious gas: *Provided further*, That any inmate of the reformatory who is under the age of twenty-one (21) years at the time of commitment may be paroled by the board without regard to the limitations set forth in this section.

"The board of prison, terms and paroles shall require of every able-bodied convicted person imprisoned in the penitentiary or the reformatory as many hours of faithful labor in each and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the institution in which he or she is confined.

"Every prisoner who has a favorable record of conduct at the penitentiary or the reformatory, as the case may be, or the laws of the state, and who performs in a faithful, diligent, industrious, orderly and peaceable manner the work, duties and tasks assigned to him to the satisfaction of the superintendent of the pentitentiary or the reformatory, as the case may be, and in

whose behalf the superintendent of the penitentiary or reformatory shall file a report certifying that his or her conduct and work have been meritorious and recommending allowance of time credits to him or her, shall upon, but not until, the adoption of such recommendation by the board of prison, terms and paroles, be allowed time credit reductions from the term of imprisonment fixed by the board of prison, terms and paroles.

"(c) Any person who shall have been convicted of embezzling funds from any institution of public deposit of which he was an officer or stockholder such person's confinement shall be fixed at not less than five (5) years.

"SEC. 3. To assist it in fixing the duration of a convicted person's term of confinement, prescribing treatment for such person while in confinement and supervising and regulating his or her activities while on parole, it shall not only be the duty of the board of prison, terms and paroles to thoroughly inform itself as to the facts of such convicted person's crime but also to inform itself as thoroughly as possible as to such convict as a personality. The board of prison, terms and paroles must, therefore, adopt and apply an effective technique of investigation to develop information for that purpose.

"SEC. 4. The board of prison, terms and paroles may permit a convicted person to leave the buildings and enclosures of the penitentiary or the reformatory, as the case may be, on parole, after such convicted person has served the period of confinement fixed for him

or her by the board of prison, terms and paroles, less time credits for good behavior and diligence in work as provided for by this board: *Provided*, that in no case shall the inmate be credited with more than one-third of his sentence as fixed by the board.

"The board of prison, terms and paroles shall have the power to establish rules and regulations under which a convicted person may be allowed to leave the confines of the penitentiary or the reformatory on parole, and shall also have the power to return such person to the confines of the institution from which he or she was paroled, at its discretion.

"The board of prison, terms and paroles may impose as a condition of a parole granted a convicted person that all or a portion of his or her credits earned, or to be earned, shall be forfeited in the event that such convicted person shall break his or her parole or violate any law of the state, or rule or regulation of the penitentiary or the reformatory, as the case may be, or the board of prison, terms and paroles.

"Such forfeiture of credits shall not be had except upon a hearing upon the question of such violation and upon the findings of the board of prison, terms and paroles that such convicted person was guilty thereof, which adjudication shall be final. At such hearing such convicted person, unless outside the walls of the penitentiary or the reformatory, as the case may be, as an escapee and a fugitive from justice, shall be present and entitled to be heard and present evidence and witnesses in his or her behalf.

"The written order of the board of prison, terms and paroles, bearing the seal of that body, shall be sufficient warrant for all officers named in this section to take into custody any convicted person who may be on parole and retain such person in his custody until arrangements can be made by the board of prison, terms and paroles for his or her return to the institution from which he or she was paroled.

"It is hereby made the duty of all chiefs of police, marshals of cities and villages, sheriffs of counties and all police, prison and peace officers and constables to execute any such order in the same manner as any ordinary criminal process.

"The board of prison, terms and paroles shall cause a complete record to be kept of every prisoner released on parole. Such records shall be organized in accordance with the most modern methods of filing and indexing so that there will be always immediately available complete information about each such prisoner. The board of prison, terms and paroles may make rules as to the privacy of such records and their use by others than the board of prison, terms and paroles and its staff.

"The superintendent of the penitentiary and the reformatory and all officers and employees thereof and all other public officials shall at all times cooperate with the board of prison, terms and paroles, and shall furnish to such board, its officers and employees such information as may be necessary to enable it to perform its functions, and such superintendents and other employees shall at all times give the members of such board, its officers and employees free access to all prisoners confined in the penal institutions of the state.

"It is understood that no provision in this act will limit or circumscribe the powers of the governor of the state to commute the sentence of, or grant a pardon to, any convicted person, and the governor is hereby authorized to cancel and revoke the parole granted to any convicted person by the board of prison, terms and paroles. The written order of the governor of the state cancelling or revoking such parole shall have the same force and effect and be executed in like manner as an order of the board of prison, terms and paroles.

"From and after the suspension, cancellation or revocation of the parole of any convicted person and

until his return to custody he shall be deemed an escapee and a fugitive from justice and no part of the time during which he is an escapee and fugitive from justice shall be a part of his term.

"The board of prison, terms and paroles shall make all necessary rules and regulations to carry out the provisions of this act not inconsistent therewith, and may provide the forms of all documents necessary therefor.

"The provisions of this act so far as applicable thereto are to apply to all convicted persons now serving time in the penitentiary or the reformatory, to the end that at all times the same provisions relating to sentences, imprisonments and paroles of prisoners shall apply to all the inmates thereof.

"SEC. 5. Whenever in its judgment the best interests of the state or the welfare of any prisoner confined in any penal institution will be better served by his or her transfer to another institution the board of prison, terms and paroles is authorized to order and effect such transfer.

"The board of prison, terms and paroles shall direct the transportation of convicted persons to the penitentiary and the reformatory and is hereby vested with authority to employ necessary persons for such purpose and to utilize the services of such persons for the supervision of convicted persons on parole wherever possible.

"SEC. 6. Whenever the sentence of a convicted person to the penitentiary or the reformatory is suspended by the court under authority of section 2280 of Remington's Compiled Statutes, the board of prison, terms and paroles will assume and undertake the supervision of such persons during the period of such suspension or until such sentence is terminated by the governor. The board of prison, terms and paroles will promulgate rules and regulations for the conduct of

such person during the time the suspension of his or her sentence is in effect.

"Whenever, in the opinion of the board of prison, terms and paroles, the suspension granted by the court under the provisions of section 2281 of Remington's Compiled Statutes should be revoked, the said board of prison, terms and paroles shall notify both the prosecuting attorney and the presiding judge of the superior court for the county wherein the sentence was suspended, to the end that appropriate action may be taken in the premises. If an order of the court is made revoking the suspension of a sentence, the convicted person shall be forthwith admitted to the penitentiary or the reformatory, as the case may be, and the board of prison, terms and paroles will thereafter fix the duration of such person's confinement in the manner provided for by section 2 of this act.

"SEC. 7. It shall be the duty of the board of prison, terms and paroles, when requested by the governor, to pass on the representations made in support of applications for pardons or the restoration of civil rights for convicted persons and to make recommendations thereon to the governor.

"It will also be the duty of the board of prison, terms and paroles to exercise supervision over such convicted persons as have been conditionally pardoned by the governor, to the end that such persons shall faithfully comply with the conditions of such pardons.

"SEC. 8. The board of prison, terms and paroles will consist of a chairman and two other members, each of whom shall be appointed by the governor by and with the advice and consent of the senate. The terms of the first members shall expire as follows: one member, April 15, 1937; one member, April 15, 1939; and one member April 15, 1941. Thereafter, any person appointed a member of the board shall hold office for a term of six years. Vacancies in the membership of the board shall be filled in the same manner in which the

original appointments are made. In the event of the inability of any member to act, the governor shall appoint some competent person to act in his stead during the continuance of such disability. The governor in first appointing such members shall designate one of them to serve as chairman during his term of office. The board shall elect his successor from among its members. Any member of the board may be removed by the governor for cause after an opportunity to be heard.

"The members of the board of prison, terms and paroles and its officers and employees shall not engage in any other business or profession nor hold any other public office; nor shall they, at the time of appointment nor during their incumbency of office, serve as the representative of any political party on an executive committee or other governing body thereof, nor as an executive officer or employee of any political committee or association.

"The chairman of the board shall receive an annual salary not to exceed four thousand dollars ($4000) and the other two members of the board shall receive an annual salary not to exceed thirty-five hundred dollars ($3500), and in addition thereto, their necessary expenses actually incurred in the discharge of their official duties.

"The board shall have the power to employ, and to fix, with the approval of the governor, the compensation of and to prescribe the duties of a secretary and such officers, employees and assistants as may be necessary, and to provide necessary quarters, supplies and equipment.

"The board of prison, terms and paroles shall meet at the penitentiary and the reformatory at such times as it may be necessary for a full and complete study of the cases of all convicted persons whose terms of imprisonment are to be determined by it or whose applications for parole come before it. Other times and

places of meeting may also be fixed by the board. A majority of the board shall constitute a quorum for the transaction of business and no order of the board shall be valid unless concurred in by at least two (2) of its members.

"The board of prison, terms and paroles shall transmit to the governor, for submission to the legislature, biennially, or as often as the governor may require it, a report of its work, in which shall be given the number of prisoners whose terms of imprisonment have been fixed by it and the number who have been released on parole, and such other information as may be relevant. It shall be the duty of the superintendent of the different institutions to provide suitable quarters for the board and assistants while in the charge of their duties.

"SEC. 9. That sections 2278, 2281, 2282, 2195, 10247, 10248, 10249, 10238, 10239, 10803, 10280-6, 10280-10, 10280-11, 10280-12, 10280-15, 10280-16, 10237-1 and 10237-2 of Remington's Revised Statutes of Washington be and the same are hereby repealed.

"Passed the House March 8, 1935.

"Passed the Senate March 6, 1935.

"Approved by the Governor March 20, 1935."

A reading of the act of 1935 clearly indicates that it is a new indeterminate sentence law, the administration of which is left to a board of prison terms and paroles. As will be pointed out later in this brief, indeterminate sentence statutes have uniformly been held to be constitutional and not *ex post facto*, nor to be a usurpation of judicial powers by a ministerial body, as contended by petitioners in their brief to this Court.

Referring now to the laws in existence at the time of

the offense, which were repealed by the Parole Board act of 1935, it is revealed that the substantive law governing this offense, to-wit: grand larceny, Remington's Revised Statutes 2601, remains unaltered by the act of 1935. Likewise the penalty statute relating to the punishment for grand larceny, Remington's Revised Statutes 2605, provides that any person committing an act under Remington's Revised Statutes 2601 "shall be guilty of grand larceny and be punishment by imprisonment in the state penitentiary for not more than fifteen years." As was pointed out in this brief *supra*, the sentence of the trial judge was for "not more than fifteen years." It is thus seen that the maximum sentence imposed by the trial judge under the provisions of the Parole Board act of 1935 was in the identical language of the statute in existence at the time of the offense and remaining as such at all times since.

It will be agreed by both parties to this issue, that the test of the *ex post facto* nature of the act of 1935 is to be measured by the yardstick issued by this Court in *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648.

> "Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed."

Much attention is directed to Remington's Revised Statutes 2281, and 2195 the indeterminate sentence statute of which the act of 1935 is a substitution and which was repealed by the act of 1935. Under the terms of Remington's Revised Statutes 2281 and 2195, petitioners must show that

their punishment would be less than that imposed under the Parole Board act of 1935. Remington's Revised Statutes 2281 reads as follows:

> "2281. Indeterminate sentences. Whenever any person shall be convicted of any felony for which no fixed period of confinement is imposed by law, the court shall, in addition to any fine or forfeiture which he may impose, direct that such person be confined in the state penitentiary, or in the Washington state reformatory, as the case may be, for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense of which such person shall be convicted; and where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; and where no maximum term of imprisonment is prescribed by law, the court shall fix such maximum term of imprisonment."

A comparison of the above repealed statute with the Parole Board act of 1935 discloses a most vital point in the consideration of this case, namely that there is no change in the punishment, nor does the later act inflict any greater punishment than the law annexed to the crime when committed, but it is in effect only a transfer of a discretionary power from the court to a board of prison terms and paroles; or, in other words, a mere change in the mode of procedure for carrying out of the sentence or actual period of confinement of one convicted of crime.

As to the maximum term of imprisonment, Remington's Revised Statutes 2281 provides that where no fixed period of confinement is imposed by specific statute, the term shall

be that prescribed by law for the offense of which such person shall be convicted. As in the present case, that of grand larceny, it prescribes not more than fifteen years. As has been pointed out, that was the identical maximum sentence imposed by the court upon these petitioners in passing sentence under the Parole Board act of 1935.

There has been no change in the substantive law. No court can indulge in the presumption that the court would in any given case impose a lesser maximum term than that prescribed by the substantive law.

Examining the provision as to the minimum term as declared under Remington's Revised Statutes 2281, as it would be applied to the offense of grand larceny, the old law provides that: "Where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years."

Under the substantive law of Remington's Revised Statutes 2605, relating to punishment for grand larceny, no minimum is fixed. Hence the court by general statute is required to impose a minimum of at least six months.

Under the powers granted the parole board under the act of 1935, it is possible that the persons convicted could be released from the penal institution after serving one day. There is not a scintilla of evidence in this record to indicate that these petitioners have ever been committed up to this time to any penal institution for any fixed or defin-

ite period, and, under the mandate of the statute under which they claim they have a right to be sentenced, the court is required to order them imprisoned for not less than six months. Most certainly then they are not entitled to ask relief of this Court or any other court until they have affirmatively shown that they have been confined for at least the minimum for which they must be confined under all the statutes both new and old or that the parole board has fixed a longer minimum.

This brings us to an analysis of the situation of the petitioners as to their duration of confinement at the expiration of the mandatory six months if sentenced under the old law. In 1909 the legislature of the State of Washington enacted a statute investing a state board of control with the power to determine the period of imprisonment, being Remington's Revised Statutes 2282, which reads as follows:

> "2282. The board having control to determine period of imprisonment. The state board of control, acting in conjunction with the warden of the state penitentiary, or the board of managers of the Washington state reformatory, acting in conjunction with the superintendent of such reformatory, as the case may be, *may* at any time after the expiration of the minimum term of imprisonment for which such prisoner was committed thereto, direct that any prisoner confined in such institution shall be released on parole upon such terms and conditions as in their judgment they may prescribe in each case."

This is one of the statutes repealed by the Parole Board act of 1935.

It is readily seen that under the old law, the indeterminate sentence law, Remington's Revised Statues 2281, a person convicted of crime could not demand as a matter of right or guaranty that he be released upon serving the minimum sentence. In other words, under the old law, it was discretionary with the board of control as to whether a prisoner should be released after serving his minimum sentence, and it was fully within the power of this board to require that the maximum sentence be served before release.

In 1921 a parole board of three members was created by the Washington state legislature, which supplanted the old board of control, being Remington's Revised Statutes 10803:

> "The governor shall from time to time appoint parole boards of three members, who shall respectively exercise all the powers and perform all the duties relating to the parole of prisoners from the state penitentiary and the Washington state reformatory, now vested in, and required to be performed by, the state board of control and the board of managers of the reformatory."

It necessarily follows that it was likewise within the sound discretion of the parole board created by the act of 1921 as to whether a prisoner should be released after serving the minimum term fixed by the trial judge. Again a prisoner might be compelled to serve the maximum term.

When the state legislature passed the act of 1935, it could not, therefore, have invested the parole board with any greater powers to inflict a greater minimum term of

confinement than was granted to the old boards which were in existence at the time the offense was committed by these petitioners. Again it is asserted that the act of 1935 is only a substitution of discretionary powers granted to a trial judge over to a board of prison terms and paroles.

The constitutionality of these earlier parole board acts passed by the state legislature was confirmed by the Supreme Court of the State of Washington in *State v. Feilen*, 70 Wash. 65, 41 L.R.A. (N.S.) 418.

A careful analysis and comparison of the Parole Board act of 1935 with the statutes providing for the boards in existence at the time the offense was committed leads to the conclusions that no greater punishment is inflicted, nor does the new act in any way inure to the disadvantage of the petitioners, but on the contrary is to their advantage and is in accord with the trend of modern decisions looking to, in the words of the act of 1935, the "rehabilitation" of the persons sentenced to penal institutions.

In the Parole Board act of 1935, the general subject of the act is the manner of carrying into effect the punishment, provided by law, of persons convicted of certain offenses. The principal purpose of the act is to provide a system of parole.

ARGUMENT

The courts are met at the threshold of any discussion as to the constitutionality of a legislative act with the rule of

construction familiar to this Court, that every presumption is indulged in that sustains the constitutionality of the act. This Court from the time of John Marshall has adhered to this rule of construction. *Malloy v. So. Carolina*, 237 U. S. 180; Cooley Constitutional Limitations, 7th Ed. 254.

> "The constitutionality of a law, then, is to be presumed, because the legislature, which was first required to pass upon the question, as they must be deemed to have acted with integrity and with a just desire to keep within the restrictions laid by the constitution upon their actions, have adjudged that it is so."

12 C. J. 791, Constitutional Law:

> "A presumption in favor of constitutionality is raised by the mere fact of the enactment of a statute by the legislature, and the burden of showing that it is unconstitutional is on the party asserting it."

> "It is presumed that a state legislature will not violate the federal constiution and this presumption is very strong, so much so that it is the duty of the court, where an act of a state legislature is assailed as being in violation of the federal constitution, to make every reasonable presumption against such violation."

This Court so held in *McCabe v. Atchison*, 186 Fed. 966; also in 235 U. S. 151.

The petitioners in their brief have attacked the constitutionality of the Parole Board act of 1935 principally upon the ground that it takes a statutory right of the court to fix the maximum and minimum sentence from the court and places it in a ministerial board. They rely principally in their argument on the case of *Ex Parte Lee*, a California case found in 171 Pac. 958. A reading of that case discloses

that the indeterminate sentence law passed in California did away with the system of credits for good conduct, which was not done by the legislature of Washington in passing the Parole Board act of 1935. Because of that feature the California act was held *ex post facto* and the petitioner was remanded back to the superior court for resentence. A full reading of this California case, depended upon by these petitioners, completely refutes their argument of usurpation of judicial power by a ministerial board. We quote,

> "• • • It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty. *State v. Perkins*, 143 Iowa 55, 60, 120 N. W. 62, 21 L. R. A. (N. S.) 931, 20 Ann. Cas. 1217, and cases there cited; *State v. Tyree*, 70 Kan. 203, 209, 78 Pac. 525, 3 Ann. Cas. 1020; *Woods v. State*, 130 Tenn. 100, 113 169 S. W. 558, L.R.A. 1915F, 531; *Commonwealth v. Kalck*, 239 Pa. 533, 542, 87 Atl. 61, and cases there cited. • • • The judicial branch of the government is intrusted with the function of determining the guilt of the individual and of imposing the sentence provided by law for the offense of which the individual has been found guilty. The actual carrying out of the sentence and the application of the various provisions for ameliorating the same are administrative in character, and properly exercised by an administrative body."
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> • • • • •
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> "The Supreme Court of the state of Tennessee in answering the contention that the indeterminate sentence law delegated the legislative authority to the board of prison directors said:
>
> "'The powers conferred are in no sense a delegation of legislative authority. The act does not attempt

to confer on the board the power to fix the punishment that any given crime shall bear. The act itself, in effect, becomes a part of every judgment, and the board only one of a series of agencies for the execution of the judgment. The Legislature declared by previous statutes that the period of confinement, aside from certain crimes not pertinent here, should lie between a maximum and a minimum; the ascertainment of the exact period between the two being left for the jury in each case. Under the present statute the punishment is fixed at a maximum, subject to diminution below that number of years, after the minimum shall have been served, through the operation of a certain discretion vested in the board of prison commissioners. * * * It is impossible to see any element of legislation in the power so to be exercised by the commissioners. There is a striking similarity between the powers here conferred on the board and the authority granted to prison officials under good time statutes, which have generally been held constitutional. It is true the Legislature of our state fixes the terms on which the prisoner is entitled to good time, and how much good time shall be allowed each year (Acts of 1897, c. 125, sec. 24), and it has been held to be a right which can not be denied him; but still there may be a deduction from good time earned for subsequent bad conduct, and there is a discretion in the officers, depending on their judgment as to whether he has obeyed the rules of the prison.'"

The Supreme Court of the State of Washington again passed on the precise question at bar in a decision on April 14th, 1937, in the case of *State of Washington v. John C. Mulcare et al*, reported in Vol. 89 Wash. Dec. 547. In determining the constitutionality of a state statute, namely the Parole Board act of 1935, the highest court of the state answers the principal contention of the petitioners in this case. We quote from this current decision:

"Appellants' contention is that the 1935 act is unconstitutional in that it deprives the court of a part of its judicial powers, contrary to Art. IV, Sec. 1, of the constitution, which vests the judicial power of the state in the courts. The argument is that the fixing of the term of imprisonment is a judicial power which can not be conferred upon, nor exercised by, an administrative body such as the board of prison, terms and paroles; further, that the act demotes the judiciary into a mere advisory personality and elevates a lay board to the position of a judicial tribunal.

"Acts generally similar to the 1935 act above mentioned have been enacted in many states of the Union, and have successfully withstood attacks based upon various grounds, including those suggested by the appellants here.

"The legislative authority of the state is vested in the legislature, subject to the initiative and referendum. Constitution, Art. II, Sec. 1, as amended by Amendment 7. Fixing of penalties or punishments for criminal offenses is a legislative function, and the power of the legislature in that respect is plenary and subject only to constitutional provisions against excessive fines and cruel and inhuman punishment. *State v. Duff*, 144 Iowa 142, 122 N. W. 829, 24 L.R.A. (N.S.) 625; 138 Am. St. 269; *Cave v. Haynes*, 268 N. W. (Iowa) 39; *Mutart v. Pratt*, 51 Utah 246, 170 Pac. 67; 8 R.C.L. 257, Sec. 264.

"It is the function of the judicial branch of the government to determine the guilt of persons charged with crimes and to impose the sentence provided by law for the crime of which a particular individual has been found guilty. But the execution of the sentence and the application of the various provisions for the mitigation of punishment and the reformation of the offender are administrative in character and are properly exercised by an administrative body, according to the manner prescribed by the legislature. *In re Lee*, 177 Cal. 690, 171 Pac. 958; *People v. Hale*, 64 Cal. App.

523, 222 Pac. 148, *Mutart v. Pratt*, 51 Utah 246, 170 Pac. 67; *State ex rel. Kelly v. Wolfer*, 119 Minn. 368, 138 N. W. 315, Ann. Cas. 1914A, 1248, 42 L.R.A. (N.S.) 978; *State v. Dugan*, 84 N. J. L. 603, 89 Atl. 691, 694; *Johnson v. State*, 169 Ga. 814, 152 S. E. 76.

"Since the legislature has the power to fix the term of imprisonment, and inasmuch as the courts and all other proper officials are required to carry out the legislative mandate to the extent of their authority, there is no encroachment upon, nor assumption of, judicial power by the board when it follows the rules and methods prescribed by the 1935 act, nor does that act violate any constitutional right of the appellants.

" 'Inasmuch as a legislature may fix a definite and certain term of imprisonment for any particular crime, and this without placing any discretion in the hands of the court whose duty it is to carry out the legislative mandate, it must necessarily follow that an indeterminate sentence statute violates no constitutional right of the defendant, and violates no constitutional guaranty of the state in providing that a prisoner convicted of crime shall be sentenced to the penitentiary for a period not exceeding the maximum statutory penalty for the crime.' 8 R.C.L. 261, Sec. 270.

"We hold that the act above referred to is not unconstitutional."

A study of all the authorities reveals that the decided weight of authority and text book writers supports the validity of such enactments.

Quoting from Wharton's Criminal Law, Volume 1, Section 44; R. A. 1915 F. 531:

"The indeterminate sentence in parole laws have in recent years greatly expanded earlier methods of relieving those convicted from set penalties fixed for

crime. Usually further provision is made by law that the convict may, after serving the minimum sentence, be released on parole and let go at large, under such conditions as the court or a board or other power may prescribe, having regard to the reformation of the prisoner and the welfare of society. Authority to parole is not a judicial power nor a delegation of legislative authority."

Rooney v. North Dakota, 196 U. S. 180.

In *Marion v. State*, 29 N. W. 911, it was held to be within the power of the legislature to change the procedure or *manner of enforcing the punishment* after the commission of the offense, and such law would not be *ex post facto*. The change made between time of the crime and trial was that the right to fix the punishment was transferred from the jury to the judge.

Might it not equally be transferred from the judge to a parole board?

Citing Cooley on Constitutional Limitation at p. 331.
See also *People v. Joyce*, 92 N. E. 607, *infra*.
I Bishop on Criminal Procedure, Sec. 115:

"It is a doctrine extending through every department of the law, that rights, when vested in individuals, are unchangeable, while remedies by which those rights are enforced may be varied from time to time at the pleasure of the legislature."

Indeterminate Punishment, 8 R.C.L. Sec. 270, Criminal Law:

"Inasmuch as a legislature may fix a definite and certain term of imprisonment for any particular crime and this without placing any discretion in the hands of

the court whose duty it is to carry out the legislative mandate, it must necessarily follow that an indeterminate sentence statute violates no constitutional right of the defendant and violates no constitutional guaranty of the state in providing that a prisoner convicted of crime shall be sentenced to the penitentiary for a period not exceeding the maximum statutory penalty for the crime. Powers granted under such an act to a board of pardons *are not judicial in character* but are matters of prison discipline and are intended to be exercised for the benefit of offenders who are in prison. Neither is the provision of such an act by which the court sentences the accused to the maximum term fixed by the statute an infliction of punishment out of proportion to the offense. An indeterminate sentence law which does not add to or increase the punishment of an offense beyond that existing at the time of its commission is not *ex post facto*, though the crime was committed before the passage of the act. A different method of fixing the amount of punishment between certain limits, which merely mitigates the punishment, does not add to or increase it."

In *People v. Joyce*, 92 N. E. 607, 20 Ann. Cas. 472, the Illinois parole board act was attacked on the ground that the act conferred judicial powers on the board of pardons and so was unconstitutional. The Supreme Court of Illinois held that judicial power in a constitutional sense is the power which adjudicates upon and protects the rights and interests of individual citizens, and to that end construes and applies the law.

Administrative and executive officers are often called upon, in the performance of their duties, to exercise judgment and discretion, to investigate, deliberate and decide, and yet it is held they do not exercise judicial power within the meaning of the constitutional provision.

The functions of the court in regard to the punishment of crimes are to determine the guilt or innocence of the accused, and, if that determination be one of guilty, then to pronounce the punishment or penalty prescribed by law. The execution of the sentence belongs to a different department of the government. The manner of executing the sentence and the mitigation of punishment are determined by the legislative department and what the legislature has determined in that regard must be put in force and effect by administrative officers.

> "The right to have the court fix the amount of punishment is no more a fundamental right than it is to have the jury fix it."

The Indiana indeterminate sentence law was attacked as *ex post facto* in *Davis v. State*, 51 N. E. 928, the facts being, as in the case at bar, that the offense was committed before the passage of the act. Paralleling the instant case, the situation was that the limits of punishment were the same under both laws. The Supreme Court of Indiana held that any change which "only prescribes a different method of fixing the amount of punishment within those limits" is not *ex post facto*. On the facts and reasoning of this leading cast from the Indiana Supreme Court, can be readily found the basis of decision in the case at bar.

The Indiana Supreme Court in *Miller v. State*, 59 N. E. 894, answering a claim of usurpation of judicial power, has declared that:

> "If the statute fixing the imprisonment is not in

> violation of said section of the constitution (cruel and inhuman punishment), then any punishment assessed by the court or jury within the limits fixed by the statute (the indeterminate sentence act) can not be adjudged excessive by this court, for the reason that the power to declare what punishment may be assessed against those convicted of crime is not a judicial power but a legislative power, controlled only by the provisions of the constitution." Citing *People v. Illinois State Reformatory*, 36 N. E. 78.

This latter case is much cited by the authorities and was an instance where only a maximum term was imposed by the court, exactly as was done in the case at bar, and the actual period of confinement was placed in the discretion of the board of managers. The Illinois court held that all violators of the criminal law have no constitutional right to have the quantity of his punishment fixed by a jury. Quoting Blackstone, in his two Commentaries, Book 4, Sec. 12:

> "The quantity of punishment can never be absolutely determined by any standing, invariable rule, but it must be left to the arbitration of the legislature to inflict such penalties as are warranted by the laws of nature and society and such as appear to be best calculated to answer the end of prevention against future offenses."

This Court has held in *Duncan v. Missouri*, 152 U. S. 377, 38 L. Ed. 485, that the prescribing of different modes of procedure and the abolition of courts and the creation of new ones, leaving untouched all the substantial protections with which the existing law surrounds the person accused of crime, are not considered within the constitutional inhibition against *ex post facto* law.

The same conclusion was arrived at by the Supreme Court of Pennsylvania in *Commonwealth v. Kalck*, 87 Atl. 61, when it followed this Court's ruling in the *Duncan* case, *supra*. In the *Kalck* case the defendant was convicted of a felony and before sentence was imposed an indeterminate sentence law was passed and went into effect. Kalck claimed the new law to be *ex post facto* because it increased the punishment. The substantive law prescribing punishments and penalties remained the same before and after the passage of the new law, just as it has in the present case. The reasoning of Judge Elkin appeals to us as extremely good logic and we quote from his opinion as follows:

> "• • • The argument is that the crime of which appellant stands convicted was committed while the Act of 1909 was in force, and that this act fixed the punishment for murder of the second degree at from 5 to 20 years; that is, under an indeterminate sentence the maximum was 20 years and the minimum not more than 5 years. The act of 1911 changed this provision of the Act of 1909 by giving to the trial court the power to fix the minimum sentence at any number of years within the maximum limit, and this is the matter about which appellant complains. Under the Act of 1909 her minimum sentence would have been 5 years, while under the Act of 1911 it was fixed by the court at 15 years, and in this way it is said the punishment of appellant has been increased.
>
> "This position overlooks the fact that neither the Act of 1909 nor the Act of 1911 undertook to fix the punishment for any crime, nor did these acts repeal the laws then in existence, prescribing penalties and punishments for different crimes. The punishment for murder of the second degree is fixed by the Act of April 14, 1893 (P. L. 17), which amended the Act of March

31, 1860 (P. L. 382). The Act of 1893 provides that: 'Every person duly convicted of the crime of murder of the second degree, shall, for the first offense, be sentenced to undergo an imprisonment, by separate or solitary confinement, not exceeding twenty years, and for the second offense for the period of his natural life.' This is the act, and the only act, in force at the time the crime in the present case was committed, fixing the punishment for second degree murder. The Acts of 1909 and 1911 did not repeal the Act of 1893. The intention not to repeal acts prescribing penalties and punishments clearly appears in the title and all through the enacting clauses of the Acts of 1909 and 1911. These acts undertook to regulate, not the law which fixed the punishments, but the sentencing of convicts, and the method of releasing them on parole. The purpose of these acts was to regulate the control and discipline of persons convicted of crimes with a view to their reformation. Under these acts the courts can sentence in such manner as to give the offender an opportunity to secure a release on parole upon certain conditions within the control of the prison authorities when recommended by the board of pardons and approved by the Governor. But nowhere in the Acts of 1909 and 1911 did the legislature undertake to prescribe penalties and punishments for crimes, as to which the law remained the same after as before the passage of these acts. • • • We may safely conclude, therefore, under the well-settled rule, that, the statutory plnishment having been neither changed nor increased by the Act of 1911, appellant can not escape punishment on the ground of this act being an ex post facto law as to her.

"This view is in accord with the trend of decision interpreting indeterminate sentence laws in many other jurisdictions, in which it was held that a sentence for an indefinite term must be deemed a sentence for the maximum term prescribed by law as a punishment for the offense committed. • • •

"(4) A statute which mitigates the penalty is not objectionable on the ground of being an ex post facto

law, although passed after the crime was committed. *Com. v. Wyman*, 66 Mass. (12 Cush.) 237; *Com. v. Gardner*, 77 Mass. (11 Gray) 438; *Dolan v. Thomas*, 94 Mass. (12 Allen) 421.

"(5) So, too, statutes which relate to procedure or penal administration, or prison discipline, are not to be considered ex post facto, even though the effect may be to enhance the severity of the punishment. *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485; *Cook v. U. S.*, 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906; *Gut v. State*, 76 U. S. 35, 19 L. Ed. 573; *Marion v. State*, 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825; *People v. Mortimer*, 46 Cal. 114. Indeed, it may be stated as a general rule that no one has a right to insist that particular remedies shall remain unchanged, or that courts and their jurisdiction and the proceedings in them shall continue unaltered, or that there shall be no departure from established methods in prison discipline or penal administration. Retrospective legislation relating to crimes and punishments may or may not be declared unconstitutional on the ground of being ex post facto. The question in each case is whether it will increase the punishment or deprive a party of substantial rights to which he was entitled under the law as it stood at the time the offense was committed. If the situation is not altered or changed to the disadvantage of the complaining party, the law, even if passed after the offense was committed, is not ex post facto as to him. We are not familiar with any decision, and none has been called to our attention, declaring an act unconstitutional which related to prison discipline, or to penal administration, intended to benefit prisoners, on the ground of its being an ex post facto law, even if such an act was retrospective in its operation.

"In the present case the maximum punishment for murder of the second degree under the Act of 1893 was an imprisonment of 20 years, and nothing contained in the Act of 1911 increased or aggravated the crime. The provisions of this act were intended to benefit convicted persons and to mitigate the severity of their pun-

ishment as prescribed by law. This act represents the humanitarian view of those most competent to speak on the question of the proper treatment of criminals. It is believed to be wholesome legislation, and we can see no reason why courts should be astute in sustaining technical objections intended to strike it down."

12 C. J. 1103, Constitutional Law:

"Statutes that relate to parole administration or prison discipline in the sense that they merely provide for the enforcement of the sentences of convicted persons are not ex post facto as to offenses previously committed."

"Where a law relates to matters of procedure merely, and does not deprive the accused of any substantial protection, it is not ex post facto."

The constitutionality of an indeterminate sentence imposed was sustained by the Supreme Court of Massachusetts in *Commonwealth v. Brown*, 45 N. E. 1, and held to apply to all such sentences imposed after the passage of the act.

12 C. J. 1102, Constitutional Law:

"Indeterminate sentence laws providing that instead of sentence for a definite time, the sentence shall be for not less than a certain minimum nor more than a certain maximum, the length of the term between such limits to depend on the behavior of the prisoner, are not unconstitutional as such, even as applied to past offenses."

People v. Stratton, 28 Pac. (2d) 695.

State v. Mulcar & Eagen, 89 Wash. Dec. 547.

In the event that this court should hold the Parole Board act of 1935 to be *ex post facto* as to these petitioners

but without waiving our argument in any sense as to the validity of the Parole Board Act of 1935, we respectfully submit that these petitioners should be remanded back to the superior court of Spokane County for resentence by reason of the general saving clause, Remington's Revised Statutes 2006, which reads as follows:

> "2006. Repeal and amendment of criminal statutes—Saving clause presumed. No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be awended or repealed, all offenses committed, or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act; and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein."

The validity of this general saving clause statute has been sustained in *State v. Newcomb*, 58 Wash. 414, 109 Pac. 355; *State v. Fair*, 35 Wash. 127, 76 Pac. 731, 102 Am. St. 897; *State v. Ames*, 47 Wash. 328, 92 Pac. 137; *State v. Hanover*, 55 Wash. 403, 104 Pac. 624, 107 Pac. 388.

That this is the proper procedure has been held by the Supreme Court of the State of Washington in the cases of *In re Blystone*, 75 Wash. 286, 134 Pac. 827, and *State v. Nicholes*, 135 Wash. 333, 237 Pac. 706.

This Court has followed this procedure in compliance with Section 461, Title 28, U.S.C.A., and in the case of *Bryant v. U. S.*, 214 Fed. 51, held:

> "The defects in the first sentence, if any, did not inhere in the trial or verdict and therefore it appears Bryant is guilty and was properly convicted."

Quoting from another decision of this Court, *Ex Parte Spencer*, 228 U. S. 652, 57 L. Ed. 1010:

> "When the orderly procedure of appeal is employed, the case is kept within the control and disposition of the courts; and if the judgment be excessive or illegal, it may be modified or changed, and complete justice done as we have said, to the prisoner, and the penalties of the law satisfied as well."

And further quoting from *Beale v. Commonwealth*, 25 Pa. 11, under section 761 R. S.:

> "The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner, whose guilt is established by a regular verdict, is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctions such a rule it would fail to perform the chief duty for which it was established."

A like disposition is found in a case on all fours on the facts with the case at bar by District Judge Cavanah on November 21, 1936, in the case of *Andrus v. McCauley et al*,

No. L. 1421, in the United States District Court for the Eastern District of Washington, Southern Division, at Walla Walla, Washington. This case is cited by petitioners in their brief.

It may be of assistance in this matter to inspect the application of the Federal Saving Clause as it has been applied by the Federal courts. Section 13 of the Federal Revised Statutes, Sec. 29 of Title 1, U.S.C.A., after which was modeled the general saving clause Remington's Revised Statutes 2006 for the State of Washington, provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

In *U. C. v. Reisinger*, 128 U. S. 481, this court held the general saving clause to embrace criminal proceedings. The same rule was announced in *Great Northern Railway Company v. U. S.*, 208 U. S. 267. In these two above cases there had been a change in the substantive law subsequent to the date of the offense, whereas in the instant case the change relates only in the manner of enforcing the punishment. Sec. 5598 of the Revised Statute under the title of Repealed Proi v-sions the Federal Statute provides:

> "All offenses committed and all penalties under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same man-

ner and with the same effect as if said repeal had not been made."

To same effect see also:

Goublin v. U. S., 261 Fed. 5.
De Four v. U. S., 260 Fed. 596.
Goldberg v. U. S., 280 Fed. 728.
Yueas v. U. S., 283 Fed. 20.

There remains only the question of the proper resentence by a member of the superior court of Spokane County, other than the actual trial judge, to be decided upon. (Stipulation). That the district court or superior court retains jurisdiction for the purpose of imposition of proper sentence was clearly established by the Nebraska Supreme Court in *McCormick v. State*, 99 N. W. 237:

> "When the former sentence was set aside by this court and the cause was remanded, the matter then stood before the district court precisely as though no judgment or sentence had ever been pronounced. It was then the duty of that court, irrespective of any order of ours, to announce a legal judgment on the verdict. The district court is one of general and original jurisdiction. It had the power to try the plaintiff on the charge preferred against him and pass such sentence upon him on the verdict of guilty as was provided by law; and we are not prepared to hold that, by its abortive attempt to render a judgment against the plaintiff, its power to pronounce a legal judgment was lost. It seems clear that the power of the court could only be lost or exhausted by pronouncing a valid judgment."

The only remaining question then, is whether, the trial judge, the Honorable Chas. H. Leavy, having resigned as a member of the bench of Spokane County, on December 1, 1936, his successor in office or another judge of the superior

court of Spokane County, Washington, may properly sentence the petitioners. Sound authority seems to hold that this may be done.

This Court, in *Meldrum v. U. S.*, 146 Fed. 390, and the same case in 151 Fed. 324, has held that where stenographic notes are taken of the evidence in a criminal prosecution in a Federal court, and the trial judge dies after a verdict of guilty and while a motion for new trial is pending, his successor may not only deny the motion, but may *render judgment upon the verdict.*

Judge Gilbert, after reference to the Federal statutory provision covering death and disability of the trial judge, after which provision our state statute, Sec. 392, Remington's Revised Statutes, seems to have been modeled, uses this unequivocal language:

> "If the succeeding judge can, as undoubtedly he may under this statute, deny a motion for a new trial, there can be no question of his power to proceed further in the case and render judgment upon the verdict."

This Supreme Court decision follows the general rule found in Sec. 3007, 16 C. J. 1269:

> "As a rule the sentence is pronounced by the court before which the trial was had. Where, however, the jurisdiction of the court is not lost the judge sitting at a regular term thereof may pass sentence, unless prevented by some statutory provision, although the conviction was had at another term and before another judge. Likewise the successor of a trial judge has power to pass sentence upon a prisoner convicted before, but not sentenced by his predecessor in office, although

this power should be limited to supplying the omission of such predecessor."

The Supreme Court of Missouri in *State v. Shea,* 8 S. E. 409, has held to the same rule.

The right of another judge other than the trial judge to pass sentence was recently supported by the Supreme Court of Florida in *Anderson v. State,* 155 So. 726. In that case the court went much further than required in the instant case and held that a judge specially appointed by the governor had authority to impose sentence other than the trial judge.

> "The law is not concerned with the identity of the individual who happens to officiate as judge. It is satisfied if that individual assuming to officiate be clothed by lawful authority in that regard."

In the likewise recent case of *State v. Sweetin,* 8 Pac. (2d) 397, the Supreme Court of Kansas affirms the rule. In this Kansas case the regular judge became ill and unable to preside in court. Because of his illness and absence, a judge *pro tem* was selected to preside at the criminal trial of the defendant charged with murder. The *pro tem* trial judge presided at all proceedings, passed upon a motion for a new trial, courteously retired and left the duty of fixing and pronouncing sentence to the regular judge. It was held that it was competent for the regular judge to pronounce sentence after the judge who tried the case had retired and ceased to function as a *pro tem* judge.

The statutes of the State of Washington relating to

judgments in criminal actions, Sections 2187 to 2224 of Remington's Revised Statutes, carefully designate that the judgment is in the control of the court and not of the judge of the court.

The Supreme Court of the State of Washington in *Hallam v. Tillinghast*, 19 Wash. 23, has said:

> "The identity of the judge is lost in the court, and the court continues, although the term of a judge is ended."

Likewise in *Gunderson v. Cochrane*, 3 Wash. 476, Judge Scott has said:

> " • • • Our statute provides that the party desiring to settle a statement shall apply to the 'court or judge who tried the cause.' It can hardly be supposed that the words 'court' and 'judge' were both intended to refer to the person occupying the bench at the time of the trial, and yet this must be so, if only the judge who sat at the trial can settle the statement. This would be giving no effect to the word 'court.' While the same judge who presided at the trial continues in office, application to settle the facts is always made to him and not to the court. The word 'court' must mean something more than the judge who tried the cause. The judges change but the court continues, and it seems to me the more reasonable interpretation of the language is, that while the same judge remains on the bench, application to settle the facts should be made to him, and where he has been succeeded in office by another, the power to settle the facts rests with, or is retained by, the court, and application should be made to it by some sort of a proceeding, though most likely it could afterwards be pursued to a determination before the judge at chambers. • • • If the judge whose term of office has expired can settle the statement, it must be his duty to do it. It can not, I think, be contended suc-

cessfully that it would be optional with him to act or not in the premises. If so, he could settle a statement in one case and refuse to do so in another, and the party for whom he should refuse to act would have no remedy. No such uncertain state of affairs could have been intended. If the statute does fix the power to settle the statement in the person of the judge who tried the cause, then clearly his successor or the court could not act, and if the person who was the judge can act in one case he must act in all. This would lead to a peculiar condition, * * * ."

In re Newcomb, 56 Wash. 395.
Grossi v. Long, 136 Wash. 133.
Wharton Criminal Law, 10th Ed., Sec. 1941, p. 375.

Further under Sections 464, 465, 466, 467 and 468, Remington's Revised Statutes, it would seem that petitioners had ample remedy in the state court to correct any erroneous sentence, if one were imposed, and the statute allows one year's time for doing the same.

But finally these petitioners were given an opportunity to elect whether they would be sentenced under the old law or the new law previous to the resignation of the trial judge. (*See motion and order to appear for election as to sentence made by the trial judge, the Honorable Chas. H. Leavy, and the affidavit of J. R. McElroy that petitioners did not appear.*)

CONCLUSION

It is respectfully submitted, it appearing that petitioners were duly and properly convicted by a jury of the crime of grand larceny under the statutes of the State of Washington, and that petitioners have shown no disadvantage

in the matter of the sentence imposed, that this Honorable Court should affirm the sentence of these petitioners.

A. O. COLBURN
RALPH E. FOLEY
C. C. QUACKENBUSH
Attorneys for Appellee

in the matter of the sentence imposed, that this Honorable Court should affirm the sentence of these petitioners.

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RALPH E. FOLEY
C. C. QUACKENBUSH
Attorneys for Appellee

SUPREME COURT OF THE UNITED STATES.

No. 660.—October Term, 1936.

Elbert B. Lindsey and E. R. Lindsey, Petitioners, *vs.* State of Washington. } On Writ of Certiorari to the Supreme Court of State of Washington.

[May 17, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

In this case certiorari was granted, — U. S. —, to review a decision of the Supreme Court of Washington, — Wash. —, that Chapter 114 of the Laws of Washington, 1935, under which petitioners were sentenced to terms of imprisonment, is not an *ex post facto* law prohibited by Article I, § 10, of the Federal Constitution.

Petitioners were convicted in the state court of the crime of grand larceny, made a felony by state law, § 2601 (2), Remington Rev. Stat., and sentenced to be punished by confinement in the state penitentiary and reformatory respectively for terms of not more than fifteen years. On April 15, 1935, the date of the commission of the offense, the prescribed penalty for grand larceny was imprisonment "for not more than fifteen years." No minimum term was prescribed. Remington Rev. Stat., § 2605. On that date, the statutes also provided, Remington Rev. Stat., § 2281, for indeterminate sentences for any felony "for which no fixed period of confinement is imposed by law." All such sentences were required to be "for a term not less than the minimum nor greater than the maximum term of imprisonment prescribed by law for the offense . . . and where no minimum term of imprisonment is prescribed by law, the court shall fix the same in his discretion at not less than six months nor more than five years; . . ." Section 2282, as modified by §10803, provided for a parole board which could "at any time after the expiration of the minimum term of imprisonment . . . direct that any prisoner . . . shall be released on parole. . . ."

The Act of June 12, 1935, enacted after petitioners' commission of the offense and before his sentence, modifies the sections relating

to indeterminate sentences and paroles and provides, so far as now relevant, § 2, paragraph 1, that upon conviction of a felony "the court . . . shall fix the maximum term of such person's sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term." It also provides, § 2, paragraph 4, that within six months after the admission of a convicted person to the place of confinement, the board of prison, terms and paroles ". . . shall fix the duration of his or her confinement. The term of imprisonment so fixed shall not exceed the maximum provided by law for the offense for which he or she was convicted or the maximum fixed by the court, where the law does not provide for a maximum term."

By § 2, paragraph 6, if the person undergoing sentence commits any infraction of the rules and regulations of the place of confinement, the board ". . . may revoke any order theretofore made determining the length of the time such convicted person shall be imprisoned and make a new order determining the length of time he or she shall serve, not exceeding the maximum penalty provided by law for the crime for which he or she was convicted." It is provided, § 4, that a convicted person may be released on parole by the board after he has served the period of confinement fixed by the board, less time credits for good behavior and diligence which may not exceed "one-third of his sentence as fixed by the board", and that the board shall have power ". . . to return such person to the confines of the institution from which he or she was paroled, at its discretion." The governor is authorized to cancel and revoke paroles granted by the board, and the period following cancellation or revocation of parole, and prior to the convicted person's return to custody, is not a "part of his term."

The sentences of not more than fifteen years imposed on petitioners were the maximum provided by law, and were made mandatory by the Act of 1935. In obedience to its command the court fixed no minimum. It does not appear from the record whether the board of prison, terms and paroles has fixed the "duration" of petitioners' "confinement." Numerous grounds are urged by petitioners in support of their contention that the sentence authorized by the later statute is *ex post facto* as applied to their offense, committed before its enactment. We find it necessary to consider only one.

In sustaining the sentence the Supreme Court of Washington, without analysis or comparison of the practical operation of the two statutes, declared "The amending act does not change or inflict a greater punishment than the law in force when the alleged crime was committed for the court could under the law in force at that time pronounce a maximum sentence of not more than fifteen years. The minimum and maximum punishments remain the same as before the enactment of the act of 1935." This Court, in applying the *ex post facto* prohibition of the Federal Constitution to state laws, accepts the meaning ascribed to them by the highest court of the state. But when their meaning is thus established, whether the standards of punishment set up before and after the commission of an offense differ, and whether the later standard is more onerous than the earlier within the meaning of the constitutional prohibition, are federal questions which this Court will determine for itself. *Cummings* v. *Missouri*, 4 Wall. 277, 320, rev'g. *State* v. *Cummings*, 36 Mo. 263, 273; *Kring* v. *Missouri*, 107 U. S. 221, 223-224, 231-232. To answer them we compare the practical operation of the two statutes as applied to petitioners' offense.

Under the earlier § 2281, as the state concedes, the prisoners could have been sentenced for a maximum term less than the fifteen year penalty authorized by the statute. Under the later statute, the sentence by the court, as commanded by § 2, was for fifteen years, and the "duration of confinement" to be fixed by the board of prison, terms and paroles may be for any number of years not exceeding fifteen.

The effect of the new statute is to make mandatory what was before only the maximum sentence. Under it the prisoners may be held to confinement during the entire fifteen year period. Even if they are admitted to parole, to which they become eligible after the expiration of the terms fixed by the board, they remain subject to its surveillance and the parole may, until the expiration of the fifteen years, be revoked at the discretion of the board or cancelled at the will of the governor. It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or

material disadvantage of the wrongdoer. *Kring* v. *Missouri, supra,* 228-229; *Re Medley,* 134 U. S. 160, 171; *Thompson* v. *Utah,* 170 U. S. 343, 351. It is for this reason that an increase in the possible penalty is *ex post facto, Calder* v. *Bull,* 3 Dall. 386, 390; *Cummings* v. *Missouri, supra,* 326; *Malloy* v. *South Carolina,* 237 U. S. 180, 184, regardless of the length of the sentence actually imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier, *State* v. *Callahan,* 109 La. 946; *State* v. *Smith,* 56 Ore. 21.

Removal of the possibility of a sentence of less than fifteen years, at the end of which petitioners would be freed from further confinement and the tutelage of a parole revocable at will, operates to their detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change. *Marion* v. *State,* 16 Neb. 349. Yet this is only a more striking instance of the detriment which ensues from the revision of a statute providing for a maximum and minimum punishment by making the maximum compulsory. We need not inquire whether this is technically an increase in the punishment annexed to the crime, see *Calder* v. *Bull, supra,* 390. It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.

Petitioners were wrongly sentenced under the Act of 1935. Whether, in consequence of the invalidity of the later act, as applied to petitioners, they may be sentenced under the earlier, is a question for the state court.

The cause will be reversed and remanded for further proceedings, not inconsistent with this opinion.

Reversed.